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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

C. P. POMEROY,
REPORTER.

VOLUME 134
WITH
NOTES ON CAL. REPORTS.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article VI, section 2.]

SEC. 2. The Supreme Court shall consist of a chief justice and six associate justices. The Court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a de-

partment, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the Court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the Court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the Court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1901, page 273.]

SECTION 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[Sac. No. 775. Department Two.—August 14, 1901.]

**A. J. COOK, Respondent, v. FRANK R. ENRIGHT, Ap-
pellant.**

**VENDOR AND PURCHASER—BOND TO CONVEY MINE—POSSESSION—RE-
VERSION OF IMPROVEMENTS—OPTION OF PURCHASER.**—A bond to
convey a mine, conditioned for a deed thereof on a certain date,
provided the purchaser should have paid to the vendor a speci-
fied sum, and which gave permission to the purchaser to work the
mine, and agreed that in the event of his failure to pay at the time
named, the mining property and all improvements thereon should
revert to the vendor, and the obligation should be void, only con-
ferred an option upon the purchaser to take the property within
the time prescribed.

**1D.—ACTION TO RECOVER IMPROVEMENTS REMOVED—TENDER OF DEED
UNNECESSARY.**—There being no mutual and dependent covenants
in the bond to convey the mine, the vendor was not required to
tender a deed to the purchaser, in order to put him in default, be-
fore commencing an action against the purchaser to recover the
possession of improvements wrongfully removed by the purchaser,
or the value thereof.

APPEAL from a judgment of the Superior Court of
Shasta County. Edward Sweeney, Judge.

The facts are stated in the opinion of the court.

Garter, Dozier & Wells, and Jackson Hatch, for Appellant.

Reid & Bartlett, and Bell & Barber, for Respondent.

THE COURT.—The plaintiff recovered judgment in the court below for certain permanent mining improvements and machinery removed from the plaintiff's premises, or its value, etc. The defendant appeals from the judgment. The case, as presented by the complaint and findings, is as follows: The plaintiff was the owner of the mining claim described in the complaint, from which the machinery was removed. The defendant entered on the premises under a bond executed to him by plaintiff, August 25, 1896, in the sum of ten thousand dollars, conditioned for the execution of a conveyance of the premises to defendant on the twenty-fifth day of February, 1898, provided the latter should have paid to the former the sum of ten thousand dollars. It was also provided in the contract that the defendant should "have the right to the immediate possession of the premises and to work the mine"; and that "in the event of his failure to pay the said sum of ten thousand dollars at the time above mentioned, the said mining property and premises, together with all the improvements thereon, shall revert to and remain the property of the party of the first part, and then this obligation to be void." Indorsed on the bond is a written acceptance of its conditions, signed by the defendant. The effect of the bond is alleged in the complaint, and a copy attached; and it is alleged and found that, pending the defendant's occupation of the land under the agreement, the defendant "placed upon said mining claim, as permanent improvements thereon, permanently affixed thereto, a certain building, and in said building and on said mining claim placed the following described mining machinery and fixtures" (describing it), and "that said above-mentioned articles were permanently attached and affixed to said mining claim." It is found "that said defendant did not, at the time agreed upon, pay said ten thousand dollars, or any part thereof, nor has he at any time since said date, or at all, paid the same, or any part thereof, or offered to pay the same." The machinery, which is alleged to be of the value of four thousand two hundred dollars, was removed by defendant; and the prayer of the complaint is for its possession or value. No affirmative defense is set up by the defendant in his answer.

The only point made by appellant's counsel is, that the plaintiff's alleged right to the machinery is based on the contract, and not on his previous ownership of the land, and

that, in order to maintain his action, an offer or tender to convey was necessary on his part. This point is not tenable. This is not a case of mutual and dependent covenants, as where one is to convey, and the other to purchase and pay the purchase price. In the case at bar the defendant was under no obligation to purchase; he merely had an option to do so within the time prescribed. A tender of a deed was not necessary to put him in default. Under the terms of the contract, his rights had ceased to exist; and in the absence of any equitable claim, or offer to perform, he presents no defense to the action. In deciding this appeal we confine our attention solely to the position taken by appellant.

The judgment appealed from is affirmed.

[S. F. No. 2523. Department Two.—August 14, 1901.]

In the Matter of the Estate of CHARLES LUX, Deceased.
JAMES H. CAMPBELL, Appellant. HENRY LUX,
Administrator, et al., Respondents.

ESTATES OF DECEASED PERSONS—ATTORNEY FOR NON-RESIDENTS—POWER OF COURT—DESIGNATION IN ORDER.—Before the court can make an order appointing an attorney for non-resident devisees, legatees, heirs, or creditors of a deceased person, the court must be satisfied that such persons exist, and the order must designate who they are, and if their names are not known, they must still be identified in some mode in the order.

ID.—NON-RESIDENT REPRESENTED BY HIS ATTORNEY—FUNCTIONS OF APPOINTEE.—The court cannot appoint an attorney for a non-resident party who is already represented by his own attorney; and whenever he is represented by an attorney employed by himself, the functions of the appointee cease.

ID.—COMPENSATION OF APPOINTEE—PAYMENT BY PERSONS REPRESENTED.—The compensation of an attorney appointed by the court to represent non-resident persons interested in the estate is to be paid only on account of the interest of the persons represented, and nothing should be paid out of the estate for persons named, who turn out to have no interest in the estate.

ID.—STIPULATED FEE—VOID ORDER FOR COMPENSATION—FINAL ALLOWANCE.—Where an attorney, appointed to represent absent heirs, agreed with them for a stipulated fee, he can thereafter recover from them no greater sum. The court had no jurisdiction to make

a contract for the absent heirs; and an order made, fixing a quarterly compensation to be paid to such attorney each quarter year during administration, was void. The final allowance of the fee was in the discretion of the court, and was to be judicially determined by the court, after knowledge of the facts.

APPEAL from a decree of the Superior Court of San Mateo County settling the final account of an administrator. George H. Buck, Judge settling account, with reservation of compensation of attorney for absent heirs. James M. Troutt, Judge settling compensation.

The facts are stated in the opinion of the court.

W. A. Beasley, for Appellant.

E. B. & George H. Mastick, Loewy & Gutsch, W. B. Treadwell, and D. M. Delmas, for Respondents.

TEMPLE, J.—Charles Lux died about 1887 (the precise time does not appear in the transcript). On the twenty-fifth day of April, 1889, the superior court of San Mateo County, where the estate was in probate, made an order in which it is recited that one John Reynolds was on the fourteenth day of April, 1887, appointed to represent the absent heirs (naming them), and that said Reynolds is now superior judge of Santa Clara County, and that "James H. Campbell, of San Jose, California, has ever since been employed by and acted for such absent and minor heirs; it is therefore hereby ordered that said James H. Campbell be, and is hereby, appointed attorney for aforesaid heirs, to represent them in all proceedings throughout the administration of the estate of said Charles Lux, deceased." July 21, 1890, the court, on petition of said Campbell, ordered the executors to pay him, as such attorney, thirty thousand dollars for past services, and twelve thousand dollars per year, quarterly, every third month, thereafter, during the administration.

On the 12th of June, 1896, the executors filed a petition, in which they represented that they had paid said attorney eighty-three thousand dollars under that order, which they represented was in its nature a partial distribution to the named heirs, and for certain reasons they ask that further payments be suspended.

August 8, 1896, the absent heirs themselves applied to have

the order appointing Campbell their attorney vacated. In their petition they represented that on the fourteenth day of July, 1900, "and prior thereto," they made an agreement with Mr. Campbell, and stated that "the said J. H. Campbell agreed to act as attorney for your petitioners in the administration of the estate of said deceased, and to perform any and all legal services necessary and proper in and about the said estate of said deceased, as attorney for your petitioners, in representing them and other several interests therein, to and including the final settlement of the said estate and the distribution thereof, and to faithfully and diligently represent and act for your petitioners, as their legal attorney and adviser, throughout the administration of said estate, and in steps, matters, and proceedings therein taken for the defense, protection, and maintenance of their rights and privileges in said estate, and to institute all actions and proceedings necessary for the enforcement of the rights of your petitioners as such heirs, devisees, and legatees, and to defend them against all suits and oppose and resist all measures and proceedings likely to prove detrimental or injurious to them, or to their interests in said estate," etc., for which services they agreed to give him an interest in their portions of the estate equal to three per cent thereof. Any allowance made to him by the court was to be credited on his said fee, after paying expenses. They further represented that said attorney had already received \$93,000 for his services, and that the estate of Charles Lux was not worth more than \$2,632,383.94,—their interest therein being less than one half thereof,—and that said attorney had already been paid more than his fee.

To this petition Mr. Campbell answered, substantially admitting the employment as stated. He averred that the estate of Charles Lux was worth from ten to fifteen millions; and he relied upon the orders hereinbefore mentioned, appointing him attorney for such absent and minor heirs, and fixing his compensation.

The hearing of the petition was continued from time to time, and finally, January 5, 1897, by the consent of all parties, the orders appointing and fixing the compensation were revoked, and "all questions as to the compensation of the said J. H. Campbell, as attorney for any heirs of said estate, are hereby reserved until the final accounts of the administrator of said estate have been settled, the said estate is ready for distribution, and the said questions be then con-

sidered and determined by the court in connection with the final distribution of said estate."

The final account of the administrator was filed June 28, 1900, to which appellant excepted, because the administrator did not include compensation due him as such attorney, which had accrued under the order of July 21, 1890, fixing his compensation. He contended that the sum of eighteen thousand dollars was still due and unpaid. The claim was disallowed, and hence this appeal.

Appellant's claim to compensation is founded entirely upon section 1718 of the Code of Civil Procedure, which provides that upon the hearing of certain petitions, where all parties interested in the estate are required to be notified, the court may, in its discretion, appoint an attorney to represent, in all such proceedings, "the devisees, legatees, heirs, or creditors of the decedent, who are minors, and have no general guardian in the county, or who are non-residents of the state, and those interested, who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties, so far as known, for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment." The attorney is to be allowed a fee, to be paid as necessary cost of administration, and, upon distribution, to be charged to the party represented by the attorney. The section concludes with the declaration that the non-appointment of an attorney cannot affect the validity of the proceedings.

The statute is a very extraordinary one, but some of its provisions have been in force since 1851, without any serious challenge of its validity. The court can no more appoint an attorney with authority to bind a person who is *sui juris*, to waive his rights, or concede claims made against him, or to institute proceedings for him and incur costs chargeable to him, than it can do all these things without an attorney. And this, I think, indicates the functions of an attorney so appointed. The court can do nothing with the aid of the attorney which it could not have done without him. He receives his authority only from the court, and not at all from the absent heir. As friend of the court, his function, simply, is to aid the court in conserving the rights of unrepresented parties. In all the proceedings specified there might be a

reason for securing such aid. Witnesses might be examined; and although, as a rule, whenever there was reason for a controversy, some heir would be on hand to perform the duty, still, on rare occasions, the contrary might be the case. In any other view as to the nature of the duties of such attorney, the validity of the statute could only be sustained on the theory that succession being a matter of legislative control, the legislature has the power to authorize a probate judge to give some portion of each estate to such attorneys as he should designate. We are not at liberty to attribute such motive to the legislators, nor was it, I am convinced, so in fact.

The appointment is authorized only for a devisee, legatee, heir, or creditor. Before the appointment can be made, the court must be satisfied that such persons exist, and the order must designate who they are, or otherwise the fee allowed cannot be charged to the person represented by the attorney. If their names are not known, they must still be identified, in some mode, in the order.

It is evident that an attorney cannot be appointed for an absent heir who is already represented by an attorney. A provision for the appointment of an attorney in such a case would serve no useful purpose, and it would add greatly to the objections to the statute to suppose that it was intended to forbid a party the right to be represented by his own attorney, and compel him to accept and be bound by the acts of an attorney appointed without his consent. And it follows, that as soon as the absent heir is represented by an attorney employed by himself, the functions of the appointee cease. These last consequences would follow, though the validity of the statute were conceded to the fullest extent.

Appellant's contention is based entirely upon the proposition that he has a vested right to the compensation fixed by the order of July 21, 1890; and although he concedes that the order could be revoked, still he contends he is entitled to that compensation until it was revoked. But the order appointing him recites that for at least one year appellant had been "employed by and acted for such absent and minor heirs," and the compensation allowed him on the 21st of July, 1890, was for services rendered almost two years before the appointment was made; or if it does not sufficiently appear from the order that the absent heirs were already represented by an attorney, the record shows that within a year thereafter the

appellant was employed by the same parties and his compensation provided for by contract. From that time, conceding the entire validity of the statute and of his appointment, he could only recover from them the stipulated fee. He is paid, not out of the estate, but by his clients, even though the estate might be called upon temporarily to advance the money.

For still another reason I am convinced that, conceding the full validity claimed for the statute, and of the order appointing appellant to represent absent heirs and minors, he cannot demand the compensation fixed by the court in the order of July 21, 1890. The court had no power to make a contract for the absent heirs, and when compensation is fixed, it is to be judicially determined by the court, after knowledge of the facts. The nature of the service, its necessity, and value to the heirs, are to be ascertained and considered. This can be done only after such facts can be known. The order, therefore, fixing the compensation was void.

And furthermore, the payment can only be made on account of one of the classes of persons indicated, and the amount is chargeable to such persons. When an attorney has been appointed to represent an absent heir, nothing should be paid to such attorney, if such person does not turn out to be an heir. The succession occurs upon the death of the ancestor, but the heir is not ascertained until the decree of distribution. True, for certain purposes, during the administration, the court is required to determine provisionally whether certain persons are or are not heirs at law of the decedent. But a payment to an attorney appointed to represent an absent heir is in the nature of a partial distribution to such heir. The estate cannot be charged, under this statute, with a fee to an attorney representing a mere claimant. A chancellor may in certain cases authorize expenditures, necessary to defend a fund held in trust, out of the fund itself. But this is not that case, and the statute directs that the charge is to be against the interest represented by the attorney. Perhaps (conceding the validity of the statute) an attorney could be appointed before the heirship was determined, but if so, he must take his chances as to his compensation. The statute only authorizes payment out of the estate where the estate can be reimbursed by retaining the amount from the portion of the heir represented. There is no pretense that this was determined when the order of July 21, 1890, was made.

That the fee is always, at least till finally allowed, in the discretion of the court, is determined by the case of *Estate of Rety*, 75 Cal. 256.

This statute was recognized in that case, and has been al-
luded to in several cases. Its validity was not then ques-
tioned. As I understand *Estate of Cunningham*, 54 Cal.
556, the functions of an attorney to represent absent heirs
were there limited as I have suggested.

In conclusion, I may say that the section seems to have
been repealed by the last legislature, if the repealing act is
valid, which is a matter as yet in dispute.

The decree is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Sac. No. 808. Department One.—August 15, 1901.]

In the Matter of the Estate of WILLIAM EDWIN KEITH-
LEY, Deceased. ALICIA KEITHLEY, Appellant.
NELLIE BERNICE KEITHLEY, Executrix, Respond-
ent.

**WILL—CONTEST OF PROBATE—SPECIAL VERDICT—ANSWERS TO QUES-
TIONS—ULTIMATE FACTS—AUTHENTICATION.**—Upon a contest of the
probate of a will, it is proper for the court to submit to the jury
questions relating only to the ultimate facts to be found, covering
the issues growing out of the contest; and the embodiment of such
questions and the answers thereto as the verdict of the jury, fol-
lowed by a certificate signed by the foreman, showing that the jury
“do find the foregoing facts and verdict,” constitutes a special ver-
dict of the jury properly authenticated.

**ID.—EVIDENCE—MENTAL CAPACITY OF TESTATOR—QUALIFICATION OF
WITNESSES—INTIMATE ACQUAINTANCES—DISCRETION.**—The qualifi-
cation of witnesses, as “intimate acquaintances,” to testify to the
mental capacity of the testator leaves the question of sufficient ac-
quaintance largely in the discretion of the court; and its ruling
thereupon will not be disturbed upon appeal, unless there is a clear
abuse of discretion.

ID.—APPEARANCE AND ACTION OF TESTATOR AT PARTICULAR TIME.—Any
witness acquainted with the fact may testify as to the appearance,

demeanor, and action of the testator at a particular time, and as to whether, at that time, he acted rationally, or appeared rational to the witness.

1D.—INSTRUCTIONS—PRACTICE.—It is better practice that instructions should not be numerous, and that those given should be as simple and plain as possible, and cover the issues, so that the jury may fully understand them.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. E. E. Gaddis, Judge.

The facts are stated in the opinion of the court.

R. Clark, for Appellant.

Arthur C. Huston, for Respondent.

VAN DYKE, J.—The appeal in this case is from the judgment, entered on the fifth day of March, 1900, admitting the will to probate, in favor of proponent, and also from the order denying contestant's motion for a new trial. The appeal from the judgment not having been taken within time, that branch of the appeal cannot be considered.

Many alleged errors are assigned in the motion for a new trial, but in the argument of appellant's counsel on the appeal denying said motion, stress is laid principally upon three matters alleged as error. These are,—1. That the special verdict has no validity, from the fact that it was not signed by the jury or its foreman; 2. Errors occurring in the introduction of testimony; 3. Certain instructions given at the request of proponent.

1. At the close of the trial, contestant's attorney submitted certain special issues, which were agreed to by proponent and submitted by the court to the jury, "whereupon [as the record recites] the jury retired to consider the said verdict, and were afterwards returned into court with the verdict in the manner following:—

"VERDICT AND FINDINGS OF THE JURY.

"Was W. E. Keithley, on September 1, 1899, at the time of the making of the will in contest, of sound and disposing mind?

"Answer: 'Yes.'

"Did W. E. Keithley declare to G. W. Dufficey that the will in contest was his will, at the time he signed his name thereto?

"Answer: 'Yes.'

"Did W. E. Keithley declare to Annie G. McDonald that the will in contest was his will, at the time he signed his name thereto?

"Answer: 'Yes.'

"Did W. E. Keithley request G. W. Dufficey to sign his name to the will in contest as a witness?

"Answer: 'Yes.'

"Did W. E. Keithley request Annie G. McDonald to sign her name to the will in contest as a witness thereto?

"Answer: 'Yes.'

"Did G. W. Dufficey sign the will in contest as a witness thereto, in the presence of W. E. Keithley?

"Answer: 'Yes.'

"Did Annie G. McDonald sign the will in contest as a witness thereto, in the presence of W. E. Keithley?

"Answer: 'Yes.'

"We, the jury impaneled to try the above-entitled cause, do find the foregoing facts and verdict.

"S. P. RUSSELL, Foreman."

This constitutes a special verdict: "A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., sec. 624.) The questions propounded and answered by the jury constitute the ultimate facts to be found, covering the issues growing out of the contest of the probate of the will in question, and together they form a special verdict, and this was signed by the foreman of the jury, as required by law. (Code Civ. Proc., sec. 618.)

2. It is contended by the appellant that the court erred in admitting testimony over contestant's objection, wherein it is claimed certain witnesses were permitted to give their opinion respecting the mental sanity of the testator at the time of making the will, where it did not appear that such witnesses were "intimate acquaintances" of said deceased. The cases

pointed out by appellant's counsel under this head relate to the testimony of witnesses Spencer, Lizzie Connor, William Connor, Eugene Cotty, Miss Igo, and Mary Leonard. From an examination of Spencer, as shown by the record, it appears that he was quite intimate with the deceased, and therefore, under the code provision (Code Civ. Proc., sec. 1870, subd. 10), was competent to answer the question propounded in reference to the mental sanity of the testator. The same may be said in reference to the witness Lizzie Connor, but the question propounded to her was, simply, how he appeared, compared with himself when he was well, from a mental standpoint, and she answered, "He was rational. I did not see any difference in him, only he was weak from sickness." William Connor saw him several times at the hospital in Sacramento, and was asked, "During the times you visited Mr. Keithley there, did he appear to you rational or irrational? . . .—A. Rational,"—proponent's counsel stating in answer to objection of contestant's counsel, that the testimony was not offered to show the condition of the mind of the deceased, but as to his appearance. The witness Cotty was quite well acquainted with the deceased, and was asked as to his condition of mind, compared with himself prior to his sickness, and answered, "He seemed to be all right. He seemed rational. The witness Miss Igo was a nurse at the hospital when Keithley was there, and was asked, "In all these visits you paid to Mr. Keithley during the time you saw him there, did he, from a mental standpoint, appear rational or irrational?" and answered, "Rational." The witness Miss Leonard was also a nurse at the hospital, and was asked a similar question, and answered, "I think he was rational. I never detected anything which indicated to me that he was not rational." In support of his contention under this head, appellant relies upon *Estate of Carpenter*, 94 Cal. 414. In reference to that case it is said: "But while that case discusses and defines what the words 'intimate acquaintance,' as used in the statute, mean, it does not undertake to prescribe any measure of proof by which that relationship is to be determined. And in the nature of things, it would be difficult to do so." (*People v. McCarthy*, 115 Cal. 258.) And, after quoting from the opinion in that case, the court adds: "So it will be seen that that case leaves the question of competency practically where it found it,—a question of large discretion in the trial judge to determine whether the evidence in any instance, brings the witness

within the rule of the statute." It is shown in reference to the witnesses whose answers are objected to, that they had a greater or less degree of intimacy or acquaintance with the deceased, and also, with the exception of the witness Spencer, that the questions did not call for an opinion as to the mental sanity of the deceased, but how he appeared to the witnesses. In *People v. McCarthy*, 115 Cal. 258, the court held that it was proper to ask a witness whether the defendant acted rationally or appeared rational at a particular time; and in *People v. Arrighini*, 122 Cal. 123, it is said that "a witness may testify to the demeanor of the party, whether melancholy, morose, peevish, irritable, or the opposite, and, no doubt, other mental habits may be testified to,—such as whether he was incoherent, forgetful, or irrational." "Something must be conceded to the intelligence of the witness and his habits of observation, and all these qualifications the trial court can better judge." (*People v. Schmitt*, 106 Cal. 52.) "And so it has been held, and wisely, that the trial judge is to be accorded wide discretion and latitude in this respect; and his ruling will not be disturbed, except where the evidence is so lacking as to leave no just room for question that the discretion has been improperly exercised." (*People v. McCarthy*, 115 Cal. 258.)

3. Contestant submitted twenty-one instructions to be given to the jury, only two of which were refused and two others modified. On the part of proponent, sixty different instructions were submitted, twenty-three of which were given, a number of which were modified. Among the instructions given at the request of proponent, the appellant contends that some trench upon the constitutional right of the jury to be the exclusive judges of the credibility of witnesses. A careful examination of these instructions fails to show us that they are subject to appellant's criticism in this respect. In view of the multitude of instructions submitted to the court, it would not be surprising at all if the language of some had been subject to criticism, but, upon the whole, these seem to be fair, and free from legal objection. It may not be amiss here to animadvert upon the practice too frequently indulged, in jury trials, of loading down the case with innumerable instructions. Because they may be found in a form-book on the subject, it does not follow that it is necessary to copy them all in every case, however involved in style they may be or irrelevant to the issues presented. A good case is frequently ruined by such a practice. The more

simply and plainly instructions can be framed and cover the issues, the better the jury will understand them, and the less likely will they be to run counter to some rule of law.

Order appealed from affirmed. Appeal from the judgment dismissed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 2467. Department One.—August 15, 1901.]

JAMES CONCANNON, Respondent, v. R. P. SMITH, Appellant.

STATUTE OF LIMITATIONS—BARRED NOTE AND MORTGAGE—ACTION UPON NEW PROMISE—CONSIDERATION—SUFFICIENCY OF COMPLAINT.—A complaint setting forth a note and mortgage, and alleging that in an action to foreclose the mortgage it was adjudged that they were barred by the statute of limitations, and that they were so barred, and that subsequent to the bar of the statute the defendant, on certain dates specified, in writings signed by him, acknowledged the indebtedness and promised to pay the same, is not upon the note, but upon the new promise, of which the barred note and mortgage set forth constituted the consideration, and the complaint states a sufficient cause of action upon the new promise, as against a general demurrer.

ID.—NEW PROMISES PRIOR TO FORECLOSURE SUIT—RES ADJUDICATA—MATTER NOT IN ISSUE.—The fact that the new promises, in writing, declared upon, though made after the bar of the statute, were made before the commencement of the foreclosure suit, does not make the adjudication in that suit, that the note and mortgage were barred by the statute of limitations, an adjudication against the cause of action upon the new promise, which was not in fact pleaded or placed in issue in the former suit.

ID.—EVIDENCE OF NEW PROMISE—LETTERS—PART PAYMENTS—IMPLIED PROMISE.—Letters signed by the defendant, asking plaintiff to send a statement of his affairs, and inclosing part payments upon his indebtedness to the plaintiff, and expressing a hope to send more, and to pay the interest, it appearing that there was no other indebtedness from defendant than the barred note and mortgage, are evidence of an implied promise to pay that debt.

ID.—FORMAL ACKNOWLEDGMENT OR PROMISE NOT REQUIRED—RECOGNITION OF SUBSISTING DEBT.—The statute does not prescribe any

form in which the new acknowledgment or promise shall be made. It need not be formal; and it is sufficient, if the writing shows that the writer regards or treats the indebtedness as subsisting; and from the acknowledgment of a subsisting indebtedness the law implies a promise to pay it, based upon the consideration of the old debt.

PLEADING—AMENDMENT OF COMPLAINT—OMISSION OF CAUSE OF ACTION.

—The plaintiff, when granted leave to file an amended complaint, may entirely omit one of the causes of action set forth in the original complaint. The defendant cannot be prejudiced by the abandonment of a cause of action alleged against him.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion.

Mullany, Grant & Cushing, for Appellant.

G. W. Langan, for Respondent.

HAYNES, C.—Action for the recovery of money. The plaintiff had findings and judgment, and defendant appeals, upon the judgment roll, which contains a bill of exceptions setting out all of the evidence.

The first question presented involves the sufficiency of the complaint, which is, in substance, as follows: That on January 2, 1894, the defendant executed his promissory note to the plaintiff for the sum of two thousand eight hundred dollars, payable in one year from date, with interest at ten per centum per annum, a copy of which is set out in the complaint; that certain specified payments had been made thereon at specified dates; that at the time of the commencement of this action there was and now is due and owing from defendant to plaintiff, an account of the principal sum of said promissory note, the sum of two thousand dollars, and interest at seven per cent from May 1, 1899; that said note was secured by mortgage of even date therewith, which was duly recorded; that on November 25, 1899, plaintiff commenced an action against said R. P. Smith; that the second cause of action set out in the complaint in said action was upon said note and mortgage, to foreclose the same; that defendant demurred to said second cause of action, for want of facts, because it appeared to be barred by section 337 of the Code of Civil Procedure; that said demurrer was sustained, and on February 5, 1900, judgment was rendered, that plain-

tiff take nothing by said second cause of action; that in fact said promissory note and mortgage were barred by said section of the code at the time said action was commenced. The ninth paragraph of the complaint is as follows: "That on or about the eighth day of April, 1899, and on or about the twenty-fifth day of April, 1899, and on or about the eight day of May, 1899, and on or about the twentieth day of May, 1899, the said defendant, R. P. Smith, acknowledged to plaintiff his said indebtedness to the plaintiff and promised to pay the same, which said acknowledgments and promises were contained in several writings signed by the said defendant, R. P. Smith." The complaint concluded with an allegation of non-payment, and prayer for judgment.

The demurrer assumes,—1. That this action is upon said note, and as it purports to be secured by mortgage, that the action will not lie, a foreclosure of the mortgage not being sought; 2. That the cause of action stated in the complaint was adjudicated in the former action against the plaintiff; 3. That facts sufficient to constitute a cause of action are not stated; 4. That the cause of action stated is barred by section 337 of the Code of Civil Procedure.

This demurrer was properly overruled. The fact that a copy of the note was set out in the complaint, accompanied by a detailed statement of the payments that had been made thereon, and that at the time this action was commenced a certain amount of the principal sum mentioned in it had not been paid, when taken in connection with the subsequent allegations, does not justify appellant's contention that the suit was upon the note. It was subsequently alleged that a foreclosure suit was brought upon the note and mortgage by the plaintiff; that, upon demurrer thereto, it was adjudged that the right of action was barred by the statute of limitations, and judgment of dismissal was entered against him; and it was also alleged in the complaint herein that said note and mortgage were in fact barred. The note became due on January 2, 1895, and was barred by the statute, January 3, 1899, but the complaint, as we have seen, alleges that on certain dates in April and May, 1899, the defendant acknowledged his said indebtedness, in several writings signed by him. These writings were not set out in the complaint, but they are pleaded according to their legal effect, and that is

sufficient. The purpose for which the pleader alleged the former suit, plea, and judgment was doubtless to prevent being met by the defense, if he had simply alleged an amount unpaid upon the note, that the plea of the statute was a personal privilege, and that the action should be upon the note and mortgage. While the plaintiff was not bound to anticipate defenses that might be pleaded to his action, his doing so will not make his complaint obnoxious to a general demurrer. If in any case it should result in making the complaint ambiguous, unintelligible, or uncertain, it may be demurred to on those grounds, or one of them. The note was set out as a part of the history of the case, and which, in connection with the former action, and the plea of the statute of limitations therein by the defendant, showed the consideration relied upon to support the new promise, which promise was made after plaintiff's remedy upon the note and mortgage had become barred by the statute. A distinction must be taken between a new promise made *before* an action is barred upon the original contract, and a new promise made *after* the original contract is barred. When made *before*, the debtor merely continues his liability for a longer term, and the action is upon the original promise. "In other words, he merely waives so much of the period of limitations as has run in his favor. But when his legal obligation is at an end by reason of the lapse of the full period of limitation, or of a discharge in bankruptcy, a new promise creates a new obligation, and it is itself the basis of the action." (*Southern Pacific Co. v. Prosser*, 122 Cal. 413, 417. See also *Rodgers v. Byers*, 127 Cal. 528, 530, where the subject is fully discussed and numerous authorities cited.) These authorities conclusively show that the adjudication in the former action, that the note and mortgage were barred by the statute of limitations, was not an adjudication of the cause of action in the present case, which is "a new obligation, and is itself the basis of the action."

Appellant contends, however, that the new promises now relied upon by plaintiff were made before the first action was brought, and might have been litigated in that action.

In support of this contention, counsel quote from Freeman on Judgments (4th ed., sec. 249, p. 441) as follows: "An adjudication is final and conclusive not only as to the

matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in matters of claim and of defense." This passage is quoted by the learned author from *Harris v. Harris*, 36 Barb. 88. But the author adds: "The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action, is misleading.

What is really meant by this expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, . . . but as long as these several matters are not tendered as issues in the action, they are not affected by it."

Defendant's motion for judgment in his favor on the amended complaint was properly denied. This motion is based upon the supposition that the amended complaint did not state a cause of action,—a supposition already disposed of.

The amended complaint entirely omitted a cause of action for two hundred dollars, money lent to defendant, stated in the original complaint. It is contended that defendant's motion for default as to that cause of action should have been granted. For aught that appears, the leave to amend was general and unlimited, and the omission was therefore discretionary with the plaintiff. Besides, we do not see how the defendant was injured by the abandonment of a cause of action alleged against him.

The plaintiff, for the purpose of proving his allegation that the defendant, after his promissory note became barred by the statute of limitations, acknowledged his indebtedness in writing, offered in evidence certain letters written by defendant to the plaintiff. The defendant's objections to the introduction of these letters were overruled and exceptions taken. The defendant also contends that the evidence is not sufficient to justify the finding that he did acknowledge an indebtedness to the plaintiff. These points may be considered together.

The first of these letters was as follows:—

"MR. CUNCENIN *dear sir* if you please to Send me a Statement of my affairs and the first of May will try and cum up

next month and hope that everything is all right and have plenty of rain this year.

Yours truly,

"R. P. SMITH."

The envelope showed that it was mailed at Vallejo, and received at Livermore April 9, 1899.

The second letter is dated "April 25, 99," and is as follows:—

JAMES CONCANNON *dear sir* I send you a chack for nine hundred dolers 913 and will send you more soon glad that all the family is well hoping to hear from you soon and is glad that there is plenty of rain.

Yours truly,

"R. P. SMITH."

The third letter bears date "May 8, 99," and so far as material reads as follows:—

"MR. JAMES CONCANNON *dear sir* if you plase to culeck two hundred dolers from Mr. John frick i sent him i letter for to send the rent so that I could pay you the intrass so if you plase to get the money I will send him a letter today for Mr. frick to pay you or you can see Mr. Sellers and tell him for it was he that sent me the last two hundred dolers....

"Yours truly,

R. P. SMITH."

In connection with these letters, the plaintiff testified that there was no other indebtedness from defendant to him than that involved in this action, and the court found that on April 25, 1899, there was unpaid \$1,966.67, and on that day, and on May 8, 1899, in consideration of said sum, the defendant, "in writing signed by him, acknowledged to the plaintiff, personally, his said indebtedness to the plaintiff."

The court did not err in receiving these letters in evidence, and they fully sustain the findings. The first letter asked for a statement of account of his affairs. The defendant testified that he complied with his request. This letter was introductory. It was written April 8, 1899. On the 25th, he made a partial payment, by a check, inclosed in his letter of that date for \$913, and added, "I will send you more soon." The third letter, dated May 8th, was an order upon Mr. Frick for \$200, "to pay you the interest." Each of these letters was signed by the defendant.

Section 360 of the Code of Civil Procedure provides: "No

acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

The statute does not prescribe any form in which the acknowledgment or promise shall be made. Whether these writings constitute a sufficient "acknowledgment or promise" is therefore a question of law. The imperative thing is, that it shall be "contained in some writing, signed by the party to be charged thereby." The expression, "contained in some writing," clearly indicates that it is not essential that the acknowledgment or promise should be formal, such as that "I hereby acknowledge," or "hereby promise." It is sufficient if it shows that the writer regards or treats the indebtedness as subsisting, and from this acknowledgment the law implies a promise to pay, and for which promise the old debt is a sufficient consideration. The second of these letters inclosed a check for \$913, which was in part payment, and the writer promised to pay more soon.

In *Barron v. Kennedy*, 17 Cal. 574, 577, Chief Justice Field, speaking for the court, said: "Part payment has always been held sufficient to take the debt on which it is made out of the statute. Unless accompanied at the time by qualifying declarations or acts on the part of the party making the payment, it is deemed an unequivocal admission of a subsisting contract or liability, from which a jury is justified and bound to infer a new promise. The authorities are uniform to this point. And it matters not whether the payment be either upon the principal or interest of the debt" (citing several cases); and after quoting section 31 of the statute of limitations (which is now section 360 of the Code of Civil Procedure), it was further said, "This section does not purport to make any change in the effect of acknowledgments or promises, but simply to alter the mode of their proof."

In *Auzerais v. Naglee*, 74 Cal. 60, 69, there was indorsed upon an account rendered to Naglee, the following:—

"Received, December 8, 1880, of Henry M. Naglee, one thousand dollars on account of the within.

"E. AUZERAIS, Liquidating Partner."

This indorsement, including his name, was in the handwriting of the debtor, Henry M. Naglee. It was contended by

the plaintiff "that this part payment, evidenced by a writing in which the name of Naglee appear under his own hand, is a sufficient signing, under the statute (Code Civ. Proc., sec. 360), to suspend its operation," and this contention was sustained.

So the third letter, providing for the payment of interest, was an unequivocal admission of the existence of an indebtedness, and there was no other indebtedness to which it could apply than that involved in this action. These letters were properly received in evidence, and clearly justify the findings specified.

The point that certain of the findings are contrary to the pleadings is based upon the contention that this action is upon the note, and not upon the new promise,—a point hereinbefore considered and disposed of.

I advise that the judgment be affirmed.

Smith, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.
Hearing in Bank denied.

[L. A. No. 848. Department Two.—August 15, 1901.]

ONTARIO DECIDUOUS FRUIT GROWERS' ASSOCIATION, Respondent, v. CUTTING FRUIT PACKING COMPANY, Appellant.

SALES—FAILURE OF ENTIRE CONTRACT—DELIVERY AND ACCEPTANCE OF PART—WAIVER—ACTION FOR GOODS SOLD AND DELIVERED.—Notwithstanding the failure of an entire contract for the sale of a specified quantity of goods, yet if the vendee accepts and retains part thereof delivered to him, he thereby waives the condition precedent as to the delivery of the remainder, and the vendor may recover the value of the part delivered, in an action for goods sold and delivered.

ID.—SALE OF MINIMUM QUANTITY OF FRUIT—FAILURE FROM DROUGHT—IMPOSSIBILITY OF FULL PERFORMANCE—NON-LIABILITY FOR DAMAGES.—Where a sale was made by plaintiff to defendant under a written contract for a minimum quantity of specific varieties of peaches growing and to be grown on specific orchards, which defendant's agents inspected, and which were so affected by an unex-

pected drought as to render full performance of the contract impossible, the non-performance thereof in full was excused, and the plaintiff is entitled to recover the value of all the peaches grown, which were delivered to and retained by the defendant, with knowledge of the facts, and is not liable in damages, by way of counterclaim or otherwise, for failure fully to perform the contract, owing to *vis major*, without his fault.

ID.—SUBSTITUTION OF OTHER PEACHES.—The defendant could not require the plaintiff to substitute other peaches than those contemplated in the written contract, in performance thereof; nor thereby preclude a recovery for peaches already received and retained by the defendant.

ID.—PAROL EVIDENCE—IDENTIFYING SUBJECT OF CONTRACT—“SUNDRY ORCHARDS.”—Where the written contract of sale called for a certain quantity of fruit from “sundry orchards in Ontario and Cucamonga,” parol evidence was admissible to identify the subject of the contract, and to explain what orchards were meant.

ID.—PAROL AGREEMENT AS TO QUANTITY—HARMLESS RULING—IMPLIED CONDITION.—The admission of oral evidence, that it was agreed that the minimum quantity was not to be delivered unless it was grown on the plaintiff's orchards, is not prejudicial error. It could do no harm to prove by oral evidence that which was an implied condition of the agreement.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial.
John L. Campbell, Judge.

The facts are stated in the opinion.

Warren Olney, and Curtis & Curtis, for Appellant.

E. R. Annable, for Respondent.

GRAY, C.—This action was brought to recover the price of certain peaches sold and delivered under a contract in writing. The defendant set up as a defense non-compliance of plaintiff with the contract, and also a counterclaim on account of damages arising out of such non-compliance. The plaintiff had judgment, from which and from an order denying a new trial the defendant appeals.

The contract between the parties contains the following stipulations: “Seller has this day sold and agrees to deliver to buyer, f. o. b. cars at South Cucamonga, and buyer has bought and agrees to receive from seller, the peaches, to the extent named, grown during the year 1898 on the orchard or land known and described as follows: sundry orchards in

Ontario and Cucamonga, at the prices and on the terms and conditions named." Then follow the terms, showing the grades and varieties of peaches sold, the minimum and maximum quantities of each, and the price per ton, and then the contract proceeds as follows: "Deliveries shall be made between the twentieth day of July and the first day of September, 1898, and shall conform as far as possible to the mutual convenience of buyer and seller." Then follows a description of the fruit as to quality and size, and after that we quote again, "Payments shall be made as follows: One half the delivery value within ten days of the date of full delivery, and one half (the balance) of delivery value within thirty days of the date of final delivery, or the execution of all the terms of this contract by the seller." The contract is signed by the corporation plaintiff as the "seller," and the defendant corporation as the "buyer."

At the trial, it was shown by oral evidence, against the objection and exception of defendant, that the "sundry orchards" spoken of in the written contract referred to and was confined to orchards belonging to the stockholders of plaintiff.

It appears that the fruit crop in the districts mentioned in the contract promised well at the date of the making of said contract, and that in an ordinary year the orchards referred to herein would have produced sufficient fruit to carry out the contract, but before it was fully grown the season turned unusually dry and hot, and hot winds impaired the quantity and quality of the fruit to such an extent that it was impossible for plaintiff to furnish, from the orchards of its stockholders in the said district mentioned in the contract, a quantity of fruit equal to one half of the minimum amount agreed to be furnished. Plaintiff did, however, furnish to defendant, and defendant received, such fruit as was grown on said orchards of the varieties and qualities described in the contract. When it was apparent that the varieties named in the contract could not be obtained from said orchards to the extent agreed upon, the defendant offered to accept "Salway" peaches in satisfaction of the contract, but the plaintiff failed to comply with this offer. "Salway" peaches were not mentioned in the contract.

The defendant places its contention for a reversal upon three grounds, as follows: 1. The plaintiff could recover

nothing without a full delivery of the minimum contract quantity of fruit, as such delivery was a condition precedent to the right to recover anything under the contract; 2. The court erred in permitting plaintiff to explain by oral evidence what was meant by "sundry orchards"; and 3. Plaintiff's refusal to furnish Salway peaches in accordance with defendant's request.

As to the first ground, we think that defendant should not be permitted to accept and retain the peaches of plaintiff, and yet refuse to pay for them. The defendant's agents had inspected the orchards of the stockholders of plaintiff, and it must have known at the time it was receiving this fruit that it was impossible to comply strictly with the contract. The rule is, that "though a contract of sale be entire, and the seller deliver only a part of the goods bargained for, yet if the vendee retain such part, the vendor may recover the value of the part retained, in an action for goods sold and delivered." (*Clark v. Moore*, 3 Mich. 55.) The acceptance and retention of a part of the goods is treated as a waiver of the condition precedent as to the delivery of the rest of the goods. And where the sale is of specific goods, and the goods perish before delivery, without the fault of the vendor, the vendee has no right of action for failure to deliver on the part of the vendor. This rule applies, also, where it becomes impossible to deliver a part of the property sold, as is illustrated in the English case of *Howell v. Coupland*, L. R. 9 Q. B. 462. As to this case we quote from Benjamin on Sales (sec. 570) as follows: "The principle of *Taylor v. Caldwell*, 3 Benl. & D. 826, was applied to a case (*Howell v. Coupland*, L. R. 9 Q. B. 462) where the contract was to sell 'two hundred tons of potatoes, grown on land belonging to the defendant in Whaplode.' The potatoes were not in existence at the date of the contract, but the land, when sown, was capable, in an average year, of producing far more than the quantity of potatoes contracted for. There was a failure of the crop from disease, and the vendor was only able to deliver eighty tons. In an action for non-delivery of the residue, the defendant was held to be excused from further performance, on the ground that the contract was for a portion of a specific crop, and therefore subject to an implied condition that the vendor should be excused if, before breach, performance became impossible from the perishing, without default on his part, of the subject-matter of the contract."

In the case at bar, the sale having been of specific varieties of fruit growing and to be grown on specific orchards and the orchards having been so far affected by the extraordinary drought that they did not produce sufficient fruit of the varieties named to comply with the contract, the plaintiff could be compelled to perform the contract only so far as it was possible for it to do so. It could not be made to perform impossibilities, nor was it liable in damages, by way of counterclaim or otherwise, for a failure to comply with its contract resulting from *vis major*, and not attributable to any fault on the part of said plaintiff. Nor could plaintiff be compelled to substitute other peaches than those contemplated in the original contract of sale. If the sale had been of a specific lot of horses, and half of them had died before delivery, I take it that no one would contend that the vendor could be compelled to substitute other horses before he could recover for such as the vendee had already received. The vendee having accepted a part of the fruit, it should pay for it at the agreed rate, and the loss of the other fruit is the misfortune of the vendee, as well as of the vendor, and neither is liable to the other on account of it. (*Dexter v. Norton*, 47 N. Y. 62.¹) The furnishing of other peaches for those lost would be substituting a new sale, rather than substantially complying with the original contract of sale. There is nothing in *Remy v. Olds*, 34 Pac. Rep. 218, in any way conflicting with the foregoing principles.

There was no error in permitting plaintiff, by parol evidence, to identify the subject-matter of the contract. The expression "sundry orchards in Ontario and Cucamonga," shows on its face that it was not the purpose of the contract to include all the orchards in the districts named, and it therefore became necessary to resort to oral evidence to explain what orchards were meant. (Benjamin on Sales, sec. 213; Taylor on Evidence, secs. 1194, 1195.) Nor was there prejudicial error in permitting it to be shown by oral evidence that defendant agreed at the time the contract was signed not to hold the plaintiff bound to deliver the minimum quantity mentioned in the contract unless that quantity was actually grown on the particular orchards embraced in the contract, because, as we have already seen, that condition could be fairly implied from the written agreement and it could

¹ 7 Am. Rep. 415.

do no harm to prove by oral evidence that which was already established by the written contract.

The judgment and order should be affirmed.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Henshaw, J., Temple, J.

[L. A. No. 942. Department One.—August 16, 1901.]

C. A. THOMPSON, Respondent, v. LEOPOLDO ORENA, Executor, etc., of JOSEFA LOUREYRO, Deceased, Appellant.

ESTATES OF DECEASED PERSONS—CLAIM—MATURITY OF CONTRACT—STATUTE OF LIMITATIONS.—A claim against the estate of a deceased woman, for services rendered to her in her lifetime, which were agreed to be paid for out of the proceeds of the sale of certain parcels of real estate, which remained unsold at her death, shows no matured cause of action against the decedent in her lifetime, and cannot be barred by the statute of limitations, which did not begin to run until the claim could be enforced.

ID.—CERTAINTY OF CLAIM—REAL ESTATE NOT DESCRIBED.—The claim against the estate of the decedent was not rendered void for uncertainty, because not describing the real estate, the proceeds of the sale of which were therein referred to as "arising from the sale of certain pieces of real property belonging to said decedent," which remained unsold at the time of her death. The only necessity for any reference to the land was to show that the claim was not barred by the statute, and the description of the land was not essential for that purpose.

ID.—ACTION UPON CLAIM—PLEADING OF PARTICULAR DETAILS.—In an action upon the claim, it is necessary to plead particular details, which are not required to be inserted in a presented claim upon a demand which is due; but even if the details alleged be more particular than is necessary, if the complaint is upon the same cause of action set out in the claim, sets forth the same services, and states the same agreement referred to in the claim, it will support a recovery thereupon.

ID.—SERVICES RENDERED PRIOR TO AGREEMENT—STATUTE OF LIMITATIONS—SUBSEQUENT ORAL PROMISE.—With respect to services ren-

dered prior to the making of the contract claimed, the statute of limitations began to run as soon as they were performed, in the absence of any agreement as to the time or manner of payment therefor; and the cause of action therefor could not be taken out of the operation of the statute by any subsequent oral promise as to a future time or mode of payment.

Id.—EVIDENCE—MEMORANDUM-BOOK OF DECEDENT.—A private memorandum-book of the decedent, containing items of money collected and paid out, including items paid to plaintiff, is not admissible in evidence against the plaintiff; and if admitted, it was properly stricken out on plaintiff's motion.

APPEAL from a judgment of the Superior Court of Santa Barbara County and from an order denying a new trial. W. S. Day, Judge.

The facts are stated in the opinion.

Thomas McNulta, for Appellant.

John J. Boyce, for Respondent.

GRAY, C.—The action is brought to recover the reasonable value of services alleged to have been rendered, as attorney and agent, by plaintiff, for the said Josefa Loureyro in her lifetime. The case was tried without a jury, and the defendant appeals from a judgment rendered in plaintiff's favor and from an order denying his motion for a new trial.

The plaintiff presented his verified claim against the estate of said Loureyro, deceased. The material part of said claim reads as follows:—

“Estate of JOSEFA LOUREYRO, Deceased.

“To C. A. THOMPSON, Dr.

“For the value of services rendered by claimant for and at the request of said decedent, continuously from the eighteenth day of August, 1881, to January 19, 1896, under a special contract, and in consideration of the promise by said decedent to pay said claimant for said services upon the sale of and out of the proceeds arising from the sale of certain pieces of real property belonging to said decedent, which said real property belonging to said decedent was unsold by said decedent at the time of her death; that said decedent failed and neglected to sell said real estate and said decedent failed and neglected to pay for said services and that said services

were performed under said special contract of agreement by claimant; that said services were and are reasonably worth the sum of three hundred (\$300.00) dollars per annum, making the total value thereof \$4,325.00."

A copy of the said claim is attached to and made a part of the complaint, and the allegations of the complaint show that the property referred to in the said claim as being unsold at the time of the death of said decedent was known as "the Mazzini Vineyard, situated near Ortega Hill," and said property is particularly described by metes and bounds in said complaint. The complaint also described the nature of the services rendered as being those of "an attorney and counsel at law, and business agent and manager of the property and business of said deceased."

The two-year statute of limitations (Code Civ. Proc., sec. 339, subd. 1) was pleaded, first in a demurrer to the complaint, and then in an answer.

The evidence in the case shows without material conflict that plaintiff, as an attorney at law, performed services for decedent in the examination of abstracts, searching of titles, collecting moneys, bringing suits, etc.; that he began this work at decedent's request in 1881, on the death of her father, and continued it down to some time in 1887, without any agreement as to when he was to be paid; that in 1887 it was orally agreed by decedent that she would pay him when she sold the property described in the complaint. The other allegations of the complaint seem to have been substantially proven, and the findings are in conformity with the proofs.

Appellant's points and authorities contain four alleged reasons for reversal. We will notice these in the order in which they appear in appellant's brief.

1. On the evidence presented, it is clear that after the agreement of 1887 the plaintiff had no matured cause of action against the decedent in her lifetime. The contract between them was the measure of the time that plaintiff was to wait for his compensation, and this contract was to the effect that plaintiff was not to be paid for his services until the sale of the land. Of course, the statute of limitations did not begin to run against plaintiff's claim until it matured and could be enforced, and plaintiff was bound by the terms of his contract as to the time of payment, regardless of whether the time fixed was reasonable or unreasonable.

2. Appellant's next contention is, that the claim of plaintiff as presented is void for uncertainty, for the reason that "there is no description of the certain pieces of real property referred to." Plaintiff's claim consisted of an amount due for his services, and the land, which he failed to describe, did not constitute any part of his claim. The only necessity for any reference to the land arose out of the fact that the claim should show that it was not barred by the statute of limitations, and the description of the land not being essential to that fact, it was therefore unnecessary to describe it. The claim was accompanied by the affidavit showing it to be due, etc., as required by the provisions of section 1494 of the Code of Civil Procedure. It will be observed that not even the *particulars* of a claim already due and not contingent are required to be set out by the provisions of the section cited. As illustrating the correctness of the position here taken, see also the opinion in *Landis v. Woodman*, 126 Cal. 454, and *Knight v. Knight*, 6 Ind. App. 268. The complaint is based upon the same cause of action set out in the presented claim. It was necessary to go more into details in the complaint than in the claim, and perhaps it may be said that the complaint went further into details than was absolutely necessary, but still it is a complaint for the same services and states the same agreement referred to in the claim. The cases of *Etchas v. Orena*, 127 Cal. 592, and *McGrath v. Carroll*, 110 Cal. 79, differ materially, as to the facts involved, from the case at bar and furnish little or no light for our guidance herein.

3. The appellant complains that the court allowed plaintiff to recover for the two years' services immediately prior to the middle of the year 1887, the time of the alleged promise. We think this complaint is not without just cause. The statute of limitations began to run as to the said two years' services as soon as they were performed, for, there having been no contract as to the time in which they were to be paid for, recovery for them could have been had at any time after completion. Indeed, in the absence of any agreement as to time or manner of payment, the plaintiff was entitled to payment for each distinct item of service as soon as it was fully performed, and the statute would begin to run accordingly; and the cause of action could not thereafter be taken out of the operation of the statute by any oral agreement or promise. (Code. Civ. Proc., sec. 360; Civ. Code, sec. 1697.)

4. A private memorandum-book in the handwriting of decedent, and kept by her in her lifetime, showing items of money collected for rent, and other collections, as well as expenditures, and including items of money paid to plaintiff, was placed in evidence by appellant, and afterwards stricken out on motion of plaintiff. In this there was no error. Section 1946 of the Code of Civil Procedure provides as to what entries or writings of a decedent may be used as evidence, and these entries, offered as they are on behalf of the estate of the decedent, are not admissible under that section. The book, containing only private memoranda, cannot be held admissible under the rule admitting a tradesman's books, or other entries made in the regular course of business.

We think, on the facts found by the court, that the judgment is correct, except as to the two years' services immediately preceding the middle of the year 1887, and that it should be modified by reducing it in a sum equal to the value of said two years' services, found by the court to be four hundred dollars, and as thus modified the judgment should be affirmed; and the order appealed from should also be affirmed.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is modified by reducing it in a sum equal to the value of said two years' services, found by the court to be four hundred dollars, and as thus modified the judgment is affirmed; and the order appealed from is also affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 2746. In Bank.—August 16, 1901.]

GEORGE G. TAYLOR, Respondent, v. ARNOLD ELLENBERGER, Appellant.

FORECLOSURE OF MORTGAGE—SALE OF REAL PROPERTY PURSUANT TO DECREE—WRIT OF ASSISTANCE.—Where a sale of real property has been regularly made pursuant to the decree in an action foreclosing a mortgage thereupon, it should not be set aside; and a writ of assistance is properly issued to place the purchaser at the foreclosure sale in possession of the mortgaged premises after the time for redemption has expired.

ID.—REAL AND PERSONAL PROPERTY MORTGAGES—SEPARATE SALES—MODIFIED JUDGMENT—EXCESSIVE INTEREST.—Where this court directed that the amounts due on real and personal property mortgages, included in the same action, be separately adjudicated, and separate sales ordered, for a proper application of the proceeds, in modifying the judgment under such direction it was excessive to compute conventional interest to the date of the modified decree. The proper apportionment should be of the amounts separately found due on the different mortgages at the date of the original decree, with legal interest from that date to the dates of the respective sales, and such amounts are to be credited as of the dates of the sales, with the net proceeds thereof, to ascertain the proper deficiencies.

APPEAL from a judgment of the Superior Court of Santa Clara County and from orders refusing to set aside a sale of real property and granting a writ of assistance. W. G. Lorigan, Judge rendering original and modified judgments. A. L. Rhodes, Judge refusing to set aside sale and granting writ of assistance.

The facts are stated in the opinion of the court.

John B. Kerwin, for Appellant.

H. F. Dusing, for Respondent.

BEATTY, C. J.—Upon a former appeal this case was remanded, with directions to modify the judgment by adjudicating separately the amounts separately secured by the real estate and personal property mortgages, and by ordering separate sales for the purpose of a proper application of the proceeds, and by deducting a certain sum erroneously found due on account of insurance. (*Taylor v. Ellenberger*, 128 Cal. 411.)

The present appeals are,—1. From an order denying defendant's motion to set aside the sale of the real property, which had been duly made in pursuance of the original decree; 2. From the judgment as modified; and 3. From an order for a writ of assistance.

There was no error in refusing to vacate the sale of the real property, which had been regularly made in pursuance of the decree. Nor was there any error in issuing the writ of assistance to place the purchaser at the foreclosure sale in possession of the mortgaged premises after the time for redemption had expired. Those orders are therefore affirmed.

But the modified judgment is erroneous and excessive. Instead of making a proper apportionment of the amounts separately due on the different mortgages at the date of the original decree, and crediting the amount found to be secured by the real estate mortgage with the net proceeds of the sale of the mortgaged premises, and then entering the proper deficiency judgment as of the date of the return of the sale, the court, for the purpose of ascertaining the amount due, went back to the date when the mortgagor made default in the payment of interest, and added to the principal of his debt, interest at the conventional rate down to the date of the modified decree. This was erroneous, for more reasons than one. The rate of interest stipulated in the notes was eight per cent per annum, compound quarterly, and that rate stopped at the date of the original decree, after which the judgment bore only seven per cent simple interest. Besides the excess resulting from this excessive rate at which the interest was computed, a still larger excess in the judgment results from the neglect to credit the proceeds of the foreclosure sale, which took place nearly a year before the date of the modified judgment. The result of this error is, that the defendant has been charged with interest upon about two thousand four hundred dollars, at eight per cent, compounded quarterly, for eleven months after it was paid.

For these reasons the cause must be again remanded for a proper modification of the judgment. In making this modification the conventional rate of interest is to be allowed only to the date of the original decree; after that, till the date of the respective sales, the sums found to be secured on the separate mortgages bear interest at seven per cent, and are to be credited, as of the dates of the sales, with the net pro-

ceeds of the sales after deducting the accruing costs and expenses. These deductions made, the proper deficiencies will be ascertained.

The attorney's fee for foreclosing the chattel mortgage cannot exceed \$66.55, and it is to be understood that the deduction of \$20.05 on account of insurance is still to be made as originally directed.

It is ordered that the cause be remanded to the trial court, with directions to modify the judgment as above indicated.

McFarland, J., Harrison, J., Van Dyke, J., and Temple, J., concurred.

[S. F. No. 1663. In Bank.—August 17, 1901.]

FRANKIE WHITE, Appellant, v. JAMES M. COSTIGAN,
Respondent.

DIVORCE SUIT—RECEIVER—MORTGAGE PERMITTED BY COURT—SUBSECTION OF PLAINTIFF'S RIGHTS.—The plaintiff in a divorce suit, in which a receiver was appointed, cannot question the validity of a mortgage permitted to be made by the defendant under an order of the court, which was affirmed upon appeal; and any title acquired by her under a receiver's sale must be subject to such mortgage.

ID.—FORECLOSURE OF MORTGAGE—PARTIES—RECEIVER—PURCHASE PENDING SUIT—RIGHT OF REDEMPTION.—Upon the foreclosure of the mortgage permitted by the court, the plaintiff in the divorce suit, not having acquired an interest in the mortgaged premises, was not a proper or necessary party. But where the receiver appeared by leave of the court, and set up the rights of the plaintiff, with her full knowledge, any interest acquired by her at a receiver's sale, made pending the suit, was subject to the decree of foreclosure, and could give her no more than a statutory right of redemption from the sale under the decree, as successor in interest of the mortgagor.

ID.—TITLE LOST BY FAILURE TO REDEEM—ACTION TO QUIET TITLE.—Where no redemption was made or attempted from the sale under the decree of foreclosure by the purchaser at the receiver's sale, and title passed under such foreclosure sale to another person, any title acquired under the receiver's sale was thereby lost, and could not be successfully asserted in an action to quiet title against the holder of the sheriff's deed under the decree of foreclosure.
[McFarland, J., dissenting.]

CXXXIV. CAL.—3

ID.—REDEMPTION BY MORTGAGEE OF OTHER LANDS—MONEY RETAINED BY PURCHASER—ESTOPPEL—SHERIFF'S DEED—ASSIGNMENT.—Where no redemption from the sale under foreclosure of the mortgage was made or attempted by the purchaser at the receiver's sale, but the payment of redemption-money was made by the holder of a judgment for deficiency under the foreclosure of a mortgage of other lands, which was accepted and retained by the purchaser under the foreclosure sale, and a certificate of redemption was thereupon issued to him, the purchaser was estopped from questioning his right to redeem, and the sheriff's deed passed title to him, with like effect as if the certificate of sale had been assigned to him when the money was received.

ID.—SUBSEQUENT QUITCLAIM DEED BY PURCHASER—INTEREST PREVIOUSLY TRANSFERRED.—A subsequent quitclaim deed executed by the purchaser at the sale under the decree of foreclosure, after reception and retention of the redemption-money by him, can have no greater effect than a second assignment of the certificate of purchase, after all of his rights thereunder had passed to the one from whom he received the redemption-money, and such quitclaim deed could confer no right.

APPEAL from a judgment of the Superior Court of Mendocino County. J. M. Mannon, Judge.

The facts are stated in the opinion of the court.

William T. Baggett, J. Q. White, Walter H. Linforth, and George E. Whitaker, for Appellant.

Seawell & Pemberton, for Respondent.

HARRISON, J.—Action to quiet title to certain land in the county of Mendocino. Judgment was rendered in favor of the defendant, from which the plaintiff has appealed, upon the judgment roll, without any bill of exceptions. The following facts appear from the findings of the court:—

In an action for divorce pending in the superior court, wherein George E. White was plaintiff and the plaintiff herein was defendant, a receiver was appointed, "to take the custody and charge of and care for the property of said George E. White, for the purpose of maintaining and preserving the right of said Frankie White, and to enable the court to enforce any judgment finally rendered in said action"; and thereafter, while said action was pending, the court, upon application of the said George E. White, granted him permission to mortgage certain of his real estate to the extent of six thousand dollars, in pursuance of which, on March 3, 1894, he executed a mortgage to one Fairbanks,

which included the lands described in the complaint herein. Under a similar order of the court he executed a mortgage to Costigan, the defendant herein, upon certain of his lands, other than those included in the complaint herein, to secure the sum of two thousand five hundred dollars. January 15, 1895, Fairbanks commenced an action for the foreclosure of his mortgage, making Costigan and the aforesaid receiver parties defendant thereto. Costigan appeared in said action and filed a cross-complaint, asking for the foreclosure of his mortgage, and that the lands described therein be sold under the same decree as that of Fairbanks. The receiver also appeared and answered the complaint of plaintiff and the cross-complaint of Costigan, and set up, by way of cross-complaint, all the rights the said Frankie White had or claimed to have in said land. After the commencement of the action, Walter H. Linforth became, by assignment, the owner of the Fairbanks mortgage, and was substituted as plaintiff therein in the place of Fairbanks. Upon the trial of the cause, the superior court rendered its judgment for the foreclosure of the two mortgages, and directed a sale of the property described therein, and the application of the proceeds of said sale. Under an order of sale issued upon this judgment, the sheriff of Mendocino County sold the said lands, March 6, 1897, in several parcels, to W. H. Linforth, and gave to him a certificate of said sale, and caused a duplicate thereof to be recorded in the office of the county recorder. The lands described in the complaint herein were sold for five hundred dollars. March 26, 1897, the sheriff returned the order of sale, setting forth that the judgment in favor of Fairbanks had been fully satisfied, and that upon the judgment in favor of Costigan there was a deficiency of \$3,937.34. Judgment was thereupon docketed against George E. White, in favor of Costigan, for this amount.

Before the time for a redemption from said sale had expired, Costigan, claiming to be a redemptioner, gave to the sheriff a written notice of redemption of the lands described in the complaint herein, together with a properly certified copy of the docket of the above-named deficiency judgment, by virtue of which he claimed the right to redeem, and an affidavit of the amount due thereon, and paid to the sheriff the sum for which said lands had been sold, together with interest thereon at the rate of two per cent per month. This money was accepted by the sheriff, and by him paid over to

Linforth, who accepted and has retained the same. Upon his receipt of said money, the sheriff gave to the defendant herein a certificate of redemption, and at the expiration of sixty days thereafter executed to him a deed of said land. After Linforth had received the money from the sheriff, and before the commencement of this action,—viz., September 8, 1897,—he executed and delivered to the plaintiff a quitclaim deed of the lands described in the complaint herein. The plaintiff gave no consideration for said deed, and at the time it was made and delivered to her, knew of the attempted redemption by the defendant herein, and of the receipt and acceptance of the redemption-money by Linforth.

By an order of the superior court in which said action of divorce was pending, made April 12, 1895, the receiver was directed to sell at public auction certain lands therein described, or enough thereof to raise the amount of one hundred thousand dollars, awarded to the plaintiff herein by the final decree in said action; and in pursuance of said order he sold certain lands, including those described in the complaint in this action, to the plaintiff herein. This sale was confirmed by the court, May 5, 1896, and under its order then made the receiver executed to the plaintiff a conveyance of all the interest of the said George E. White in said lands. The date of said deed is not given in the findings, but it was recorded November 21, 1896.

Although by bringing an action to quiet her title to the real estate against the claim of the defendant the plaintiff seeks such relief as is peculiar to equity, yet the facts upon which her title depends, as well as her right to such relief, involve only the application of legal rules, and do not call for the application of any principles of equity. She has no title to the lands described in the complaint, except such as she acquired by virtue of her purchase at the receiver's sale, and by virtue of the quitclaim deed from Linforth. It is not necessary to determine whether, upon the facts shown by the record herein, she acquired any title under the receiver's sale. (See, however, *White v. White*, 130 Cal. 597.¹) That sale was not made until Fairbanks had commenced the action to foreclose his mortgage, and as she did not then have any interest in the lands covered by the mortgage, she was not a necessary

or proper party to the foreclosure suit. The mortgage to Fairbanks was executed under an order of the superior court therefor, made upon a notice wherein she was a party. That order was affirmed in this court (*White v. White*, 33 Pac. Rep. 399), upon an appeal therefrom by her, and she must be held to be concluded thereby from questioning its effect, or the sufficiency of the mortgage executed in pursuance thereof. The court, moreover, finds that, under the permission of the superior court, the receiver in the divorce suit was made a party defendant therein, both to the complaint of Fairbanks and the cross-complaint of Costigan, and that he appeared and answered the same, "and set up, by way of cross-complaint, all the rights the said Frankie White had or claimed to have in said lands, and during the entire pendency of said action to foreclose said mortgages the plaintiff in this action had full notice and knowledge of its pendency and prosecution." Whatever interest the plaintiff acquired at the receiver's sale was therefore taken by her subject to the mortgage to Fairbanks and to the sale that might be made under the judgment in the suit for its foreclosure. After such sale she would have a statutory right of redemption therefrom, as the successor in interest of the mortgagor; but unless she made such redemption, all her claim or interest in the land would be foreclosed upon the execution of the deed from the sheriff to the purchaser or his assignee. By his purchase at that sale, Linforth acquired all the title to the land which was held by George E. White at the date of the mortgage, and if no redemption had been made, he would have been entitled to a sheriff's deed, upon the execution of which the plaintiff would cease to have any interest in the lands.

If it should be conceded that Costigan was not a redemptioner, as defined in the code, or authorized to redeem from the sale, it would not follow that, under the facts found herein, the sheriff's deed to him was ineffective to convey the title. Whether a person seeking to redeem from a sheriff's sale is authorized to make such redemption, is a question which concerns him and the purchaser alone. If the purchaser is willing to consider him as a redemptioner, and accepts and retains the redemption-money paid by him, he cannot thereafter question the effect of such redemption. (*Abadie v. Lobero*, 36 Cal. 390; *Pearson v. Pearson*, 131 Ill. 464; *Hervey v. Krost*, 116 Ind. 268.) "If a redemption made by a disqualified person is acquiesced in by the pur-

chaser, or other person from whom the redemption is made, it will estop such person, after he has received the redemption-money, from denying the validity of the redemption." (Freeman on Executions, sec. 317.) By accepting and retaining the money paid by Costigan as a redemption from the sale, Linforth was estopped from disputing that a redemption had been made, and, so long as he retained the money paid by Costigan, could not question the sufficiency of the redemption, or that the sheriff's deed vested Costigan with all the title of White that had passed at the foreclosure sale. A redemption from the purchaser at a sheriff's sale, and the issuance thereon of a certificate of redemption, is equivalent to an assignment of the certificate of sale; and the acceptance by Linforth, and his retention of the money paid to the sheriff was a ratification of Costigan's act of redemption, and had the same effect as if Linforth had executed to Costigan an assignment of his certificate of sale. (*Abadie v. Lobero*, 36 Cal. 390.) His quitclaim deed to the plaintiff had no greater effect than an assignment of the certificate of sale would have had, and as it was not made until after the above redemption had been made, it can be regarded as having no greater effect than would a second conveyance of property after he had already parted with his interest therein. The court, moreover, finds that the plaintiff gave no consideration for the deed, and that she knew at the time of its execution of the attempted redemption by Costigan, and of the receipt and acceptance of the money on the part of Linforth.

As the plaintiff has not received any conveyance from the sheriff, the legal title is not vested in her, nor do the facts found by the court disclose any equity in her favor against the defendant.

The judgment is affirmed.

Garoutte, J., Van Dyke, J., Temple, J., and Beatty, C. J., concurred.

McFARLAND, J., dissenting.—I dissent. Upon the face of the record in this case, appellant acquired title to the land in controversy under the receiver's deed. No facts appear here affecting the validity of that deed; and the court expressly found that the order of sale and the order confirming the receiver's sale were duly made and entered by the court, and

that thereafter a deed was executed by the receiver to appellant, conveying to her "all the right, title, and interest of the said George E. White in and to" certain lands, which include the land here involved. Under this original title she had a right to redeem, which was not affected by the transactions between the defendant and Linforth, and the deed to her from Linforth was, in legal effect, a redemption. But I think that, under the circumstances, defendant had an equitable lien for the amount paid by him to Linforth; and as a condition to the quieting of appellant's title, she should be required to pay that amount, with interest, to defendant within a reasonable time, to be fixed by the court. I think that the judgment should be reversed, with directions to render judgment on the findings as above indicated.

[S. F. No. 2597. In Bank.—August 19, 1901.]

**SAN FRANCISCO PAVING COMPANY, Respondent, v.
GEORGE E. BATES et al., Appellants.**

STREET-ASSESSMENT—CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT.

—The street-assessment law of this state, in providing that the expense of street-work is to be assessed in proportion to the frontage of the lots, is not repugnant to the fourteenth amendment of the Federal constitution.

ID.—VALIDITY OF ASSESSMENT—PRIMA FACIE EVIDENCE—AUTHORITY OF SECRETARY TO BID FOR CORPORATION—PRESUMPTION—BURDEN OF PROOF.

—The assessment and other documents connected therewith are *prima facie* evidence of its regularity and correctness; and from such evidence, a bid for the street-work, signed in the name of a corporation by its secretary, which was accepted by the board, in the absence of evidence to the contrary, must be presumed to have been shown to the board to have been authorized by the corporation. The burden of proof is on the defendant to establish the contrary, and to show any invalidity or irregularity of the act of the board in accepting the bid.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Freeman & Bates, and Mastick, Van Fleet & Mastick, for Appellants.

J. C. Bates, for Respondent.

McFARLAND, J.—This is an appeal by defendants from a judgment in favor of plaintiff in a street-assessment case.

The main point made by appellants is, that our street-assessment law is void because repugnant to the fourteenth amendment of the Federal constitution, in that the expense of the street-work is to be assessed in proportion to the frontage of the lots; and in support of this contention they rely on the case of *Village of Norwood v. Baker*, 172 U. S. 269. But that point was elaborately considered by this court in *Hadley v. Dague*, 130 Cal. 207, and decided adversely to appellant's contention. The conclusion there reached has been approved in subsequent cases (see *Banaz v. Smith*, 133 Cal. 102); and although invited by appellants to overrule that case, we decline to do so, as we are satisfied with it as a final declaration of the law on the subject.

The only other point made for reversal is, that the assessment was void because there was no bid or proposal on the part of respondent to do the work in question. The bill of exceptions merely shows that the respondent introduced the assessment, warrant, certificate of the engineer, diagram, etc., "and thereupon the defendants read in evidence the paper writing, a copy of which is set forth in the second finding of the court herein, and no other evidence was given or offered by either party." The paper writing referred to is the bid in question; and the only objection to it is that it was signed "San Francisco Paving Co., A. J. Raisch, Secty.," and there was no showing that the secretary was authorized to act in the premises for the respondent. But—assuming that appellants are in a position to make this objection, and that the subsequent ratification of the act by respondent was not, in any event, sufficient—it is enough to say, in the language of this court in *Pacific Paving Co. v. Mowbray*, 127 Cal. 3, that "the assessment and other documents connected therewith are made by the statute *prima facie* evidence of its regularity and correctness, and of the prior proceedings and acts of the city council, and their introduction in evidence by the plaintiff threw upon defendant the burden of establishing

the contrary." (See also *California Imp. Co. v. Reynolds*, 123 Cal. 88; *Williams v. Bergin*, 129 Cal. 461.) In the case at bar, appellants offered no evidence showing the invalidity or irregularity of the act of the board in accepting the bid; there may have been ample proof before it that the bid was authorized by the respondent.

The judgment is affirmed.

Van Dyke, J., Harrison, J., Garoutte, J., Temple, J., and Henshaw, J., concurred.

Beatty, C. J., being disqualified, did not participate.

[L. A. No. 905. Department Two.—August 21, 1901.]

M. E. BENSON et al., Respondents, v. J. Q. BRAUN, Appellant.

COSTS—FAILURE OF PLAINTIFF TO RECOVER—DEFEAT OF COUNTERCLAIM—DISCRETION.—A plaintiff who fails to recover against a defendant is not entitled to any costs against him, notwithstanding his costs were largely incurred in defending against a counterclaim of such defendant, upon which the defendant also failed to recover. In such case the court is allowed no discretion as to the costs.

MINING CLAIM—OPTION TO PURCHASE—EXPENSE OF PROSPECTING—CONSIDERATION OF OPTION—REASONABLE REQUIREMENT.—Where an option is given to purchase a mining claim, an agreement that the proposed purchaser shall expend money in prospecting the mine by the sinking of a shaft, to enable him to exercise his option, is a pledge of good faith, and is a reasonable requirement; and the expenditure made in exploiting the mine is in consideration of the option.

ID.—OPTION NOT EXERCISED—FAILURE OF TITLE—REFUSAL OF DEED—EXPENSE NOT RECOVERABLE—VALUE NOT ENHANCED.—Where the proposed purchaser does not appear to have exercised his option by tender of the purchase-money or otherwise, he cannot, merely because he refused the tender of a deed by the vendor for failure of title to one half of the mine, recover from the vendor the money expended in sinking the shaft, which is not shown to have discovered that the mine was of any value, and which is found not at all to have enhanced its value.

APPEAL from a judgment of the Superior Court of Los Angeles County. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

M. W. Conkling, for Appellant.

Bledsoe & Bledsoe, for Respondents.

TEMPLE, J.—The facts out of which the first point presented in this appeal arises may be briefly stated. Plaintiffs brought an action at law upon a money demand against appellant and another. In addition to his answer denying plaintiffs' allegations, appellant interposed a counterclaim. Plaintiffs failed to recover against appellant, but did have judgment against a co-defendant. Appellant also failed to recover upon his counterclaim. Judgment was rendered against both defendants for costs.

The judgment for costs against appellant is clearly erroneous. In such cases the court is allowed no discretion. The question is settled by sections 1022 and 1024 of the Code of Civil Procedure. It may be that the costs were nearly all incurred in defending against the counterclaim, but even then the statute does not authorize the court, where the plaintiff fails to recover, to charge the defendant with any portion of the costs.

But the appellant contends that he ought to have recovered upon his counterclaim. It contained two counts. The first was for money had and received, which need not be further noticed.

The second count in the counterclaim is of the same character, except that the facts are set forth. In it appellant set up a contract for an option to purchase a mining location from plaintiffs, by him and his assigns, for six thousand dollars, on or before September 18, 1897, plaintiffs to furnish a "good certificate showing the title to said claim to be vested in plaintiffs," except as against the United States.

The contract is copied into the complaint, and contains an allusion to a previous contract, by which plaintiffs were employed by the vendees to sink a shaft on the mine. It is averred that the vendees tendered to plaintiffs the six thousand dollars purchase-money, and demanded the deed with the stipulated certificate, but plaintiffs refused to make the deed or certificate, and as a matter of fact, it is charged, plaintiffs were unable to convey a good or merchantable title to the location.

Appellant further charged that the vendees entered into possession of the mining location in pursuance of the contract, and, before discovering the invalidity of plaintiffs' title, expended \$1,750 in making lasting improvements on the mine, of the value stated. Rescission and demand are averred.

The court finds that the agreement alluded to in the writing set out in the counterclaim was made with Lanterman, one of appellant's assignors, and was to the effect that "if Lanterman or his assigns shall, on or before June 18, 1897, make a contract with us to sink shaft on the Terre Marie Mining Claim," "we will make and execute a bond to him or his assigns to deed to him or his assigns said claim, at any time on or before three months from the date of the said contract, and to furnish," etc., the certificate as to title. A further contract was executed by Lanterman, agreeing to pay for sinking the shaft.

It was found that the shaft was sunk, and plaintiffs received from appellant and his assigns \$1,250 for the work. A tender of a deed by plaintiffs was found, which tender was refused because of the invalidity of the title, and it appears from the findings that plaintiffs had no title to one half the ground included in the location.

But the court finds that the money expended by appellant and his assignors was expended solely to enable the vendees to exercise their option, and that the value of the mining location was not at all enhanced thereby. This being so, of course, on general principles, appellant could not recover for the improvements. They were of no value. Appellant concedes this, but argues that as the contract required the expenditure in sinking the shaft, plaintiffs are estopped from denying that it was an improvement, and at all events must repay the amount as a part of the purchase price advanced to them. But the purchasers agreed to make this expenditure for the option; and that they had. It was a pledge of good faith, and a reasonable requirement, that for the privilege they should proceed to exploit the mine.

The court failed to find that the proposed vendees made a tender of the purchase-money, or in any way manifested a desire to complete the purchase.

It was not shown that the prospecting done showed that the location was of any value whatever. Waiving all question as to the form of the action, perhaps if the mine had been shown to be valuable,—worth more than six thousand dol-

lars,—and had appellant shown that he and his assignors were desirous of completing the purchase, and were prevented by failure of title, the amount expended in prospecting might have been recovered as damages. But if the mine proved to be valueless, or for any reason the appellant did not desire to purchase, even if a good title could be had, it was immaterial to him whether there was title or not.

The judgment is modified by striking out the part charging costs to appellant, and as modified it is affirmed.

McFarland, J., and Henshaw, J., concurred.

[Sac. No. 808. Department One.—August 22, 1901.]

AGNES BLAKELEY FREDERICKS, Respondent, v. D.
K. ZUMWALT, Appellant.

PUBLIC LANDS—CRITERION OF SWAMP-LAND GRANT—UNITED STATES PATENT TO SETTLER.—The criterion of the state's title to swamp and overflowed land granted by the act of September 28, 1850, is that the greater part of the smallest legal subdivision, consisting of forty acres, was too wet for cultivation. If the greater part thereof was fit for cultivation, the subdivision was not included in the grant, and the patent of the United States to a settler thereupon will confer upon him the legal title.

ID.—ABANDONMENT OF STATE'S CLAIM IN FAVOR OF SETTLERS AND PATENTEES.—By the act of March 10, 1874 (Stats. 1873-74, p. 137), the state expressly abandoned all claim to lands, as swamp and overflowed, which had been patented to pre-emption or homestead settlers by the United States, or which were then occupied by such settlers in good faith under declaratory statements filed thereupon.

ID.—SWAMP-LANDS EXCEPTED BY STATE—NEARNESS TO TOWN—VOID CERTIFICATE OF PURCHASE.—By the act of April 4, 1870 (Stats. 1869-70, p. 875), all swamp and overflowed lands situated within two miles of any town or village were excluded from grant by the state; and, upon supposition of the state's title to lands so situated, a certificate of purchase thereof by the register of the state land-office, as swamp-land, is void.

APPEAL from a judgment of the Superior Court of Tulare County. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

E. O. Larkins, and U. T. Clotfelter, for Appellant.

Alfred Daggett, for Respondent.

VANDYKE, J.—Action to quiet title, and appeal from a judgment in favor of plaintiff.

The premises in question consist of a portion of the southwest quarter of the southwest quarter of section 28, township 18 south, range 25 east, Mount Diablo base and meridian, in Tulare County.

The plaintiff and respondent derails title from one Reuben Mathews, who entered upon the subdivision embracing the premises in question as United States land, and obtained a patent for the same from the United States, January 2, 1861. The defendant and appellant claims under title derived from one Samuel Simon, who received a certificate as swamp and overflowed land from the register of the state land-office, April 8, 1874.

Plaintiff's counsel, in his brief, says: "If the land in controversy belonged to the United States when Reuben Mathews obtained his patent on January 2, 1861, then appellant has no legal title to it. If, on the other hand, said land belonged to the state of California at that time, then said land certainly belongs to appellant, for he has whatever title the state of California can give him by certificate of purchase."

1. As to the first proposition, Did the land belong to the United States at the date of the patent of Mathews? The official survey of township 18 south, range 25 east, Mount Diablo base and meridian, was made and sectionized, and the plat thereof approved and filed in the United States land-office, April 15, 1855; and from the approved map of said survey it appeared that the greater portion of the southwest quarter of the southwest quarter of said section was returned and designated on said township plat as high and dry land, and only about 12 26 / 100 acres of said subdivision was designated as "swamp," and that no portion was designated as swamp and overflowed land, or wet and unfit for cultivation. The title of the state of California to swamp and overflowed land is derived from the act of Congress, commonly called the "Arkansas Act," approved September 28, 1850. Appel-

lant contends that because it appears upon the approved township plat that a portion of the subdivision in question was swamp-land, therefore that portion which is the land in controversy passed immediately to the state of California; that the grant is one *in praesenti*; and that the officers of the United States land-office had no authority to issue a patent for the same to Reuben Mathews. It is provided by section 3 of said act that lists and plats showing the land conveyed to the state shall be prepared from the maps and plats of surveys by the United States, and "all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included in said lists and plats; but when the greater part of the subdivision is not of that character, the whole of it shall be excluded therefrom."

The supreme court of the United States, in *Railroad Co. v. Smith*, 9 Wall. 99, had occasion to construe this swamp-land act, and in reference to the provisions contained in section 3, above quoted, it is said: "Congress has here given a criterion, apparently not difficult of application, by which to determine what was granted,—to wit, such legal subdivisions of the public lands, the greater part of which were so far swamp and overflowed as to be too wet for cultivation." The phrase "legal subdivision," as used in the act of Congress relating to swamp and overflowed lands, refers to the smallest subdivision under the Congressional system of surveys, and it has been held that section 3 of the act amounts to a limitation upon the general terms of the grant, and constitutes a more accurate designation of the lands granted. The smallest regular subdivisions under the Congressional system are quarter quarter-sections, or forty-acre lots.

In *Robinson v. Forrest*, 29 Cal. 324, it is said: "The first section, when read in connection with the third, which serves to limit and define the more general terms of the first, expresses a grant to the state of the legal subdivisions of the public lands, the greater part or all of which are wet and unfit for cultivation, and is not a grant of the swamp and overflowed land without regard to legal subdivisions. In case the subdivision is intersected by the boundary of swamp and overflowed land, the question whether such subdivision vested in the state is solved by ascertaining as a matter of fact whether the greater part of said subdivision is swamp and

overflowed land or dry land. It thus appears that, under the operation of the act, dry land may be included, and swamp and overflowed may be excluded, from the grant, and that where the land lies adjacent to the margin of swamp-land, the title to any given parcel of swamp-land does not vest in the state, unless it appears that it forms the larger part of a legal subdivision." (See also *Keeran v. Allen*, 33 Cal. 542; *Hogaboom v. Ehrhardt*, 58 Cal. 233.)

In order to have the land pass to the state under the act in question, it must appear that the greater portion of the smallest subdivision—to wit, forty acres—is wet and unfit for cultivation. In this case less than one third of such subdivision was indicated as swamp-land, and none of it was indicated as wet and unfit for cultivation. And the court finds that Mathews, to whom the patent was granted by the United States, settled upon forty acres in question in 1858, only three years after the filing of the plat in the United States land-office, and cultivated and improved said land, including the tract in controversy, up to the time the patent was issued, and thereafter he and his grantees continued to cultivate and improve the same. The land in question was not returned as swamp and overflowed, or wet and unfit for cultivation; and, on the contrary, as a fact it was fit for cultivation in its natural condition. The land, therefore, never became vested in the state, and was subject to grant by the United States, and passed by patent to Mathews. (*Heath v. Wallace*, 71 Cal. 50; 138 U. S. 580; *Cragin v. Powell*, 128 U. S. 691.)

2. By an act of this state, passed March 10, 1874 (Stats. 1873-74, p. 327), it is enacted: "From and after the passage of this act, no claim shall be made by the state for any land as swamp and overflowed, nor shall the same be segregated by authority of the state, for which pre-emption or homestead patents have been issued by the United States, or upon which there are settlers, occupying the land in good faith, who have filed their pre-emption or homestead declaratory statements; nor shall the register of the state land-office receive any application for swamp and overflowed land, unless the application be accompanied by a certificate from the register of the United States land-office for the district in which the land is situated that there is no pre-emption or homestead filing upon the land sought to be purchased." That act by its terms, went into effect at the date of its passage, and therefore was a law prior to the issuing of the pretended certificate by the register of the state land-office to Samuel Simon, under

whom defendant claims. It also appears that the land in question is within two miles of and adjoining the city of Visalia; that Visalia became an incorporated town, May 6, 1864, and remained such until February 27, 1874, when it was incorporated as a city. By the provisions of an act amending the act for the management and sale of lands belonging to the state, approved April 4, 1870, it is declared that all swamp and overflowed lands within two miles of any town or village are excluded from the provisions of said act. (Stats. 1869-70, p. 875; Pol. Code, sec. 3488.) Therefore, under the findings and admitted facts in this case, the land in question, even if it had been state land, was not subject to grant at the date of said certificate to Simon, but was expressly excluded therefrom by the terms of the act just cited. The certificate, therefore, issued by the register of the state land-office was void even if it were conceded—which it is not—that the land at the time belonged to the state. (*People v. Stratton*, 25 Cal. 242; *Klauber v. Higgins*, 117 Cal. 458; *Doolan v. Carr*, 125 U. S. 618.)

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1947. Department One.—August 24, 1901.]

JOSEPH C. FREESE, Appellant, v. HELEN L. FREESE,
Respondent.

NEW TRIAL—STATEMENT PREPARED TOO LATE—VOID EXTENSION OF TIME—APPEAL FROM ORDER.—An extension of time, by the judge, in which to prepare a statement on motion for a new trial, though within the limit of thirty days, is void, if the time previously allowed to the moving party had fully elapsed while the mover was in default. The judge has no authority thereafter to settle the statement; and if settled, it cannot be considered upon appeal from the order denying the new trial.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

J. D. Sullivan, for Appellant.

Davis Louderback, for Respondent.

HARRISON, J.—Appeal from an order denying a new trial.

It is contended by the respondent that the order must be affirmed, for the reason that the appellant did not present the statement to the defendant's attorney within the time allowed therefor, and that, as the judge was not authorized to settle the same, there is no record upon which the order appealed from can be considered.

The notice of intention to move for a new trial was filed and served May 5, 1898. May 19th, the appellant obtained from the judge an order giving him ten days from that date within which to prepare and serve the statement. A similar order was made May 31st, and another on June 11th, in each of which ten days from their respective dates was allowed for the preparation of the statement. The proposed statement was not served upon the defendant's attorney until June 20th, and at the time of serving the same the attorney made the objection that it had not been served in time, and he also made the same objection when it was presented to the judge for settlement. Notwithstanding this objection, it was settled and allowed by the judge.

Under the provision of section 1054 of the Code of Civil Procedure, the judge is authorized to extend the time for preparing a statement on motion for a new trial beyond the time allowed by the code, "but such extension shall not exceed thirty days without the consent of the adverse party." Any extension for a greater period than thirty days gives no right to the moving party. (*Bunnet v. Stockton*, 83 Cal. 319; *Wheeler v. Karnes*, 125 Cal. 51; *Cameron v. Arcata etc. R. R. Co.*, 129 Cal. 279.) It is also essential that any order extending the time shall be made before the party seeking such extension is in default. If he permits the time within which he may act to elapse without acting, any subsequent order giving him time to act will not avail to revive his right to do the act. (*Clark v. Crane*, 57 Cal. 629.)

Under the order of May 19th, the time given for serving the statement expired May 30th,—May 29th being Sunday. The order of May 31st was therefore not made until after the

plaintiff was in default, and it consequently conferred no right to serve the statement. For the same reason no right was acquired by the order of June 11th. The plaintiff's right to serve the statement, as given by the code and the stipulation of the defendant, expired May 19th, and it was not served until July 20th,—more than thirty days after that date. The time within which the service could be made had therefore expired, and the judge was without authority to settle the statement. It follows, therefore, that it cannot be considered upon this appeal.

The order is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 2435. Department One.—August 24, 1901.]

**ANNIE R. KAVANAGH, Respondent, v. BOARD OF
POLICE PENSION FUND COMMISSIONERS, Ap-
pellant.**

POLICE DEPARTMENT—MEMBERSHIP OF RETIRED OFFICER.—A police-officer of San Francisco, retired from active service on account of age, who has not resigned or been dismissed from the department, still remains a member of the department.

ID.—POLICE PENSION FUND—WIDOW OF RETIRED OFFICER—VESTED RIGHTS—CITY CHARTER.—The widow of a police-officer of San Francisco, who had been placed upon the retired list, and pensioned under the act of 1889 creating the police pension fund, and who died from natural causes, prior to the adoption of the city charter, has vested rights in the pension fund, which cannot be affected by the subsequent adoption of the city charter revising the law governing police pensions in San Francisco.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

Franklin K. Lane, City Attorney, and William I. Brobeck, Assistant City Attorney, for Appellant.

Joseph J. Dunne, and Edgar D. Peixotto, for Respondent.

HAYNES, C.—Appeal from a judgment awarding the plaintiff a peremptory writ of mandate requiring the defendant to pay her the sum of one thousand dollars from a fund created by an act passed in 1889, entitled “An act to create a police relief, health, and life insurance and pension fund.” (Stats. 1889, p. 56.) The appeal is from the judgment rendered for the plaintiff upon the failure of defendant to answer after its demurrer to the third amended complaint was overruled.

Plaintiff is the widow of J. H. Kavanagh, deceased. Said Kavanagh was appointed and sworn as a member of the police department of the city and county of San Francisco on October 23, 1863, and served from that time until January 3, 1893, as an active member of said police force. At the date last named, said Kavanagh, having served for more than twenty years as an active patrol police-officer, and having attained the age of sixty-two years, was by the board of police commissioners placed upon the retired list of the police department, and pensioned pursuant to the provisions of section 3 of said act of 1889. Said Kavanagh never resigned, nor was he ever dismissed from said department. He died from natural causes, on August 28, 1897. There is sufficient money in said fund applicable to the payment of plaintiff's demand, if she is entitled thereto. The foregoing facts are condensed from the complaint. The demurrer is upon the ground that it does not state facts sufficient to constitute a cause of action.

Plaintiff's claim is based upon section 7 of said act, as amended in 1891 (Stats. 1891, p. 287), which reads as follows: “Whenever any member of the police department of such county, city and county, city, or town shall, after ten years of service, die from natural causes, then his widow or children, or if there be no widow or children, then his mother or unmarried sisters, shall be entitled to one thousand dollars from such fund.”

Appellant contends that Kavanagh was not a *member* of the police department at the time of his death, and that therefore his widow is not entitled to any insurance under the provisions of said act, and in support of this contention cites section 3 of said act, which provides that when “a member” of the department has served twenty years or more, “said board shall be empowered to order and direct that such *person*

shall, after becoming sixty years of age, *and his service in such police department shall have ceased*, be paid from such fund a yearly pension," etc. The argument of counsel is based upon the words above italicized, which, it is contended, show that Kavanagh was not a "member" of the police department. But the statute itself shows that the "services" of a member may cease without terminating his membership. In section 4, the statute speaks of persons "retired from active service," and "restored to active service," and section 8 requires all members of the police force who may be retired under the provisions of the act to report to the chief of police at stated times, and section 13 provides, among other things, that "no person who has *resigned* or been *dismissed* from said police department shall be entitled to any relief from said fund"; and as members of the police department have no terms of office, it would appear that membership could only be terminated by death, resignation, or dismissal, while "retirement" only affects services and compensation, the retired member being still required to perform such duty as may be required by the chief of police, "in cases of great public emergency." (Sec. 8.)

Appellant further contends that the right of the petitioner "is further clouded by the fact" that the new charter, which went into effect January 8, 1900, contains provisions revising the law governing police pensions in the city and county of San Francisco. (Citing Charter, c. 10, art. 8.) This article of the charter, it is said, contains, in itself, a complete revision of the police pension system of San Francisco; that the statute and charter provisions are not capable of harmonious operation; that it is competent for the legislature to repeal or modify the statute controlling such funds (citing *Pennie v. Reis*, 80 Cal. 266); and that the charter supersedes all laws inconsistent therewith. (Citing Const., art. XI, sec. 8.)

Kavanagh died, however, before the charter was approved or took effect. At the time of his death, the statute under which the plaintiff asserts her claim was in full force, and this proceeding was commenced and the alternative writ of mandate was issued September 16, 1899, before the provisions of the city charter relied upon by appellant could have any force or effect. Respondent's right therefore became vested while the statute under which she claims was in full force,

and it was not competent for the legislature, or any other authority, to deprive her of that vested right. (*Pennie v. Reis*, 132 U. S. 471.)

The judgment appealed from should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

[Sac. No. 817. Department Two.—August 24, 1901.]

J. A. VAN HARLINGEN, Appellant, v. J. B. DOYLE,
Auditor of Tuolumne County, Respondent.

COUNTY GOVERNMENT ACT—INVALID LIMITATION OF SUPPLIES AND PRINTING—CONSTITUTIONAL LAW.—That portion of section 25 of subdivision 21 of the County Government Act which provides that "no supplies, printing, stationery, or books shall be procured of any person or firm whose paper has not been established or whose place of business has not been established in the county for one year or more prior to the time of fixing said prices," is unconstitutional and void. It violates section 11 of article I of the constitution, requiring that "all laws of a general nature shall have a uniform operation," and section 21 of the same article, which forbids that "any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

ID.—"UNIFORM OPERATION" OF LAW—CLASSIFICATION—DURATION OF BUSINESS NOT A PROPER BASIS.—In order that a general law may have a uniform operation, it must be based upon a classification which is not arbitrary, but founded upon some natural or intrinsic or constitutional distinction. All merchants and publishers of newspapers stand in the same relation to supplies and advertising for the county; and they cannot be arbitrarily classified by the period of time during which they have engaged in business in the county.

ID.—PRINTING FOR COUNTY OFFICERS—SEPARATION OF VALID FROM INVALID PROVISIONS—REPEAL OF CODE SECTION.—The provisions of section 25 of subdivision 21 of the County Government Act relating to supplies furnished and printing and advertising done for county officers by a person or newspaper, to be designated by them, at prices fixed for the county printing, are valid, and separable from the invalid provisions of that section, and being inconsistent with section

3766 of the Political Code, and later in date, have worked a repeal of that section.

ID.—PRINTING DELINQUENT TAX LIST—PAYMENT BY SUPERVISORS—INJUNCTION AGAINST AUDITOR.—When the delinquent tax list was published by the tax-collector in the only newspaper that was willing to publish it at the prices fixed by the supervisors for county advertising, and the county had allowed the claim therefor upon the certificate of the tax-collector, an injunction will not lie to restrain the county auditor from drawing the warrant for the allowed claim on the ground that such newspaper had not been published in the county for one year prior to the advertising.

APPEAL from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion.

J. B. Curtin, for Appellant.

F. W. Street, and F. P. Otis, for Respondent.

CHIPMAN, C.—Action to restrain defendant, as auditor of Tuolumne County, from drawing a warrant to pay the claim of one Richardson for printing the delinquent tax list for the year 1898 in a newspaper called the Mother Lode. The court found that Richardson was the proprietor of the paper on May 27, 1899, and that the tax-collector of the county on that day caused the delinquent tax list for the year 1898 to be published in said paper for the period required by law; the list was duly published, and the bill for the work was allowed and ordered paid by the supervisors; the said newspaper was first printed in said county on January 20, 1897, and continued to be printed until September 24, 1898, when the printing was suspended, and was resumed on the twenty-seventh day of May, 1899, since which latter date, inclusive, the paper has been published; on May 3, 1899, the supervisors fixed the rate of printing and advertising in said county, in accordance with subdivision 21 of section 25 of the County Government Act, approved April 1, 1897 (Stats. 1897, p. 452, at p. 464); the tax-collector offered said delinquent tax list to all the newspapers printed, published, and established for one year prior to the third day of May, 1899, in said county, and each and all the proprietors of said newspapers refused to publish said list at the price fixed by said supervisors; thereupon said tax-collector caused the list to be published in said Mother Lode, at the rates

fixed by the said supervisors. Judgment was given for defendant, from which this appeal is prosecuted.

Appellant contends that the printing of the delinquent tax list by the Mother Lode newspaper was in violation of section 3766 of the Political Code, which, as amended in 1895, provides that "the publication must be made once a week in some newspaper, or in a supplement thereof, published in the county, and the board of supervisors must contract for such publication with the lowest bidder, and after ten days' public notice that such will be let. The bidding must be by sealed proposals." Subdivision 21 of section 25 of the County Government Act requires the board of supervisors of the several counties to advertise for sealed bids for furnishing the county with stationery and various other supplies. Then follows this provision: "The board shall annually fix the price at which the county shall be supplied with job-printing and blank-books, from a schedule prepared by the clerk of the board, showing all blanks and blank-books used in the several offices and departments, and also the price of all county advertising; and each county officer shall procure such blank-books, job-printing, and advertising required for the proper discharge of his official duties, such printing and advertising to be done by such person or newspaper as such officer may designate, at a price no greater than is so fixed, and certify the bill therefor to the board of supervisors. . . . *No supplies, printing, stationery, or books shall be procured of any person or firm whose paper has not been established, or whose place of business has not been established, in the county for one year or more prior to the time of fixing said prices.*" Section 11 of article I of the constitution provides that "all laws of a general nature shall have a uniform operation." Section 21 of the same article reads as follows: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; *nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.*"

The trial court held that the part of section 25 of the County Government Act stated in italics is unconstitutional. The advertising was let under the other provisions of the act, which, being inconsistent with the section of the Political Code referred to, and later in date, worked its repeal. It was within the power of the legislature to require the su-

supervisors to annually fix the price of certain county supplies and all county advertising, and to allow each officer requiring any advertising or such supplies to procure the same at the prices so fixed, and certify the bill to the board. These provisions of the law are clearly separable from the part claimed to be unconstitutional, and may stand, although that part be set aside. After failing to procure the advertising by any of the older established newspapers, the supervisors let the printing to the Mother Lode newspaper, in disregard of the requirement above referred to. We are to determine whether the bill for this work is illegal. An act of the legislature is not to be set aside upon any doubtful or uncertain construction to be given the constitution. But where its infraction is clear and unmistakable, the duty of the court is plain, and should be fearlessly performed. That the part of the act now drawn in question is violative of the organic law of the state, we think can admit of no doubt. It declares that county officers shall not supply the county requirements except through persons who have had established places of business in the county for a fixed period of time. No reason can be suggested why this period of time was not made longer or shorter, and the power which could fix it at one year could name any other period not absurdly or unreasonably long or short. The act manifestly was intended to limit all job-printing and advertising, and purchases of blank-books, to persons who had established places of business in the county, to the exclusion of all others. Not only must the purchases be made from and the advertising be done by persons having established places of business in the county, but such places of business must have been established for one year prior to the time when the prices are fixed by the supervisors. The unfortunate merchant or newspaper proprietor who engages in business in the county the day after the supervisors fix the prices to be paid for supplies or for printing is precluded for one year from competing for the county's patronage. He must contribute to the county's support by paying taxes, and he must perform whatever duties the law devolves upon him as a citizen of the county, but he may not share in the privilege of dealing with the county officers in respect of county supplies and printing,—a privilege which the law accords to the more fortunate merchant or printer who happened to have started in the business one day sooner than he. We think the constitution was intended to

prohibit all such discriminatory legislation. If the legislature may restrict county officers in their purchases for the county to a class of dealers who have had an established business in the county for one year, it may restrict them to still other classes which the legislature may create. Such laws cannot be regarded as general laws, for the reason that they are not uniform in their operation.

Appellant contends that a newspaper which has not been established and published for one year does not stand upon the "same terms" in relation to the law as does the newspaper which has been published for one year; that the term "all citizens" does not necessarily include all persons, but only all citizens, who stand in the same relation to the law. As illustrative of the principle relied on, we are cited to *Smith v. Judge of Twelfth District*, 17 Cal. 556; *In re Madera Irrigation District*, 92 Cal. 309; *Hellman v. Shoulters*, 114 Cal. 136; *Fontain v. Smith*, 114 Cal. 497. In speaking of laws of general nature which must have a uniform operation, the court said, in *Hellman v. Shoulters*, 114 Cal. 136: "It has been uniformly held that a law is general which applies to all of a class,—the classification being a proper one,—and that the requirements of uniformity is satisfied if it applies to all of the class alike." (Citing *Smith v. Judge of Twelfth District*, 17 Cal. 556.) But whether the classification in the present case is a proper one, is the very point involved. We do not think the legislature can arbitrarily create the class, and when thus created, that the courts are in all such cases bound to accept such classification as a proper one.

It was said in *Abeel v. Clark*, 84 Cal. 226, "that an act, to be general in its scope, need not include all classes of individuals in the state; it answers the constitutional requirements if it relates to and operates uniformly upon the whole of any single class." But this statement was commented upon in *Pasadena v. Stimson*, 91 Cal. 238, as erroneously supposed to support the proposition "that a law is not special if it applies equally to all members of any single class defined by the legislature, no matter how arbitrary and senseless the classification may be." And it was said, that "although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in

the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." All merchants and publishers of newspapers in a county stand in precisely the same relation to the subject of the law in furnishing supplies and doing the advertising for the county. But the act confers particular privileges upon certain merchants and publishers, and imposes peculiar disabilities and burdensome conditions on other merchants and publishers, all of whom stand in the same relation to the law. It was not within the power of the legislature to evade the operation of the constitutional provisions by creating an arbitrary and unnatural distinction between persons thus related to the law. If it were possible to classify merchants and publishers of newspapers in any case so as to apply one law to one class and another law to another class, it is certain that they cannot be classified upon any such line of demarcation as is attempted in this act. *Fontain v. Smith*, 114 Cal. 497, cited by appellant, involved the constitutionality of section 2853 of the Political Code, prohibiting the supervisors from authorizing the establishment of a toll-bridge or ferry within one mile above or below a regularly established ferry or toll-bridge. It was held that the section grants no privileges or immunities which, "upon the same terms, shall not be granted to all citizens." The court said: "The theory upon which such rights are granted is, to promote the public good and convenience, the advancement of commerce, and the more ready intercourse of the people; and a reasonable protection of those who hazard their private means in thus ministering to the public need is in the interest and direction of good government, by encouraging enterprise." No such theory or reason can be said to support the legislation in question. On the contrary, the law operates to prevent competition, where the highest interests of the people require free and untrammelled business intercourse. It would puzzle the mind to suggest any natural, intrinsic, or constitutional distinction with which a newspaper that has been established thirteen months is clothed or may be clothed, that a newspaper established eleven months may not possess. We can perceive no possible public good to come from the distinction made by the law before us, while it is easy to suggest much harm that it may do. All the older established newspapers in the county refused to do the work at the prices fixed by

the board, which we must assume were fair and reasonable. It is now insisted that the county has no right, under the law, to have the printing done, because the newspaper designated does not stand upon the same terms in relation to the law as the other newspapers. But the only reason why it does not stand upon the same term results from no natural, intrinsic, or constitutional distinction, but from an arbitrary and unreasonable distinction created by the law itself. It is one of the highest privileges of the citizen that he may engage in legitimate business upon equal terms—"the same terms"—granted to all citizens. He may buy and sell from whom and to whom he pleases. The law may require him to pay a license for the privilege, and it may regulate his business if the safety of the community requires its regulation. But the law cannot say that he must have conducted an established business for a given period of time before he can sell to a county officer, while he may sell without restriction to all other persons. As well might the legislature say that the county shall not employ any citizen of the county to work on the public road unless he has resided within the county one or more years. (See Cooley's Constitutional Limitations, 4th ed., *393.)

The county of Lassen undertook by ordinance to require owners of sheep to pay a license on sheep grazed in that county, on which the county and state taxes were paid in another county, but exempting from the license the owner who paid taxes on his sheep in Lassen County. This court held the ordinance to be in violation of section 21 of article I of the constitution. (*County of Lassen v. Cone*, 72 Cal. 387.) There was no question but that the county could pass a license ordinance applicable alike to all owners of sheep, and such an ordinance was upheld in *Ex parte Mirande*, 73 Cal. 365; *County of El Dorado v. Meiss*, 100 Cal. 268. But the Lassen County ordinance granted a privilege to the resident owner of sheep which it denied to the non-resident owner; it allowed the resident owner the privilege of grazing sheep in Lassen County, free from any license tax, while imposing such tax on the non-resident owner; and it was thus held to have violated the constitution. Nor does the fact that, in the present case, the restriction was limited to dealings with the county officers relieve the act from its discriminating character. That plaintiff was permitted to publish

advertisements for all persons save only the county officers but emphasizes the obnoxious feature of the law.

The judgment should be affirmed.

Smith, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 794. Department Two.—August 24, 1901.]

GEORGE F. TODHUNTER et al., Respondents, v. J. P. KLEMMER et al., Appellants.

ACTION UPON STAY BOND—DISTRIBUTION OF ESTATE OF DECEASED OBLIGEE—COLLATERAL ATTACK.—In an action upon a stay bond, given upon appeal in an ejectment suit to several obligees, one of whom had died, the distribution of the estate of the deceased obligee to plaintiffs cannot be collaterally attacked by the obligors, made defendants in the action.

ID.—FORMER ACTION PENDING—DISMISSAL.—A plea of a former action pending for the same cause is not available, where the former action was regularly dismissed before the commencement of the second action.

ID.—PROOF OF NON-PAYMENT OF BOND—ADMISSION OF PLEADING.—The non-payment of the bond sued upon need not be proved, where it is alleged in the complaint and not denied in the answer.

ID.—EVIDENCE INADMISSIBLE UNDER PLEADINGS—OCCUPATION OF LAND BY DEFENDANT IN EJECTMENT—RECEIVER.—Where the pleadings in the action upon the bond admitted the alleged occupation of the land by the defendant in the ejectment suit, and the alleged value thereof, evidence offered by the defendants to show the appointment of a receiver, and his possession of the land, is inadmissible under the pleadings.

ID.—REFUSAL OF AMENDMENT AT TRIAL—DISCRETION—ABSENCE OF WRITING AND VERIFICATION.—The refusal of leave to the defendant to make a proposed amendment at the trial was within the discretion of the court; and that discretion was properly exercised, where the proposed amendment was objected to, not only as being too late, but also as not being in writing and without verification of the facts.

ID.—JUDGMENT IN EJECTMENT—PRIOR DEATH OF CO-PLAINTIFF—JURISDICTION—JUDGMENT AND BOND UPON APPEAL NOT VOID.—The fact that one of the co-plaintiffs in the ejectment suit died prior to the judgment rendered therein did not deprive the court of jurisdiction, nor render the judgment absolutely void; nor did it vitiate a bond given upon appeal in his favor as one of the co-plaintiffs. His name as obligee represented his executors or distributees as the real parties in interest. The undertaking necessarily followed the judgment, and was valid, both as against the obligors, and in favor of the executors or distributees of the deceased obligor named therein.

APPEAL from a judgment of the Superior Court of Glenn County and from an order denying a new trial. Oval Pirkey, Judge.

The record shows that, pending the action of ejectment in which the stay bond in suit was given, one of the plaintiffs, William P. Todhunter, died, August 13, 1896, before the action was tried, and that the judgment was nominally in his favor as one of the plaintiffs. Further facts are stated in the opinion.

Geis & Alberry, for Appellants.

Frank Freeman, and Charles L. Donohoe, for Respondents.

SMITH, C.—This is an appeal from a judgment for the plaintiffs and from an order denying the defendants' motion for a new trial. The suit was brought on an undertaking of the defendants, given on appeal in an action of ejectment in which the plaintiffs and one William P. Todhunter were plaintiffs and one Armstrong defendant, which was affirmed on appeal. But at the date of the judgment, September 21, 1896, the last-named plaintiff had been dead for over a month and his executors were not appointed until seven days afterwards. The undertaking was to "the plaintiffs" in the ejectment suit (*eo nomine*), and was for double the amount of costs (\$29.25), and for the value of the use and occupation of the land in question, not exceeding \$750. It is alleged in the complaint, and not denied, that the value of the use and occupation of the land while occupied by the defendant was fifteen hundred dollars; and, also, it is alleged that by a decree of distribution duly made and entered by the superior court of the county of Yolo, April 19, 1897 (prior to the be-

ginning of this suit), in the matter of the estate of said deceased Todhunter, the whole of the estate of deceased, including his interest in the undertaking in question, was distributed to the plaintiffs. The case was tried before a jury, which, under instructions to that effect from the court, returned a verdict for the plaintiffs for the sum of \$779.25. Numerous points are made by the appellants' counsel, but they may be reduced, in effect, to the following, viz.: 1. That the judgment in the ejectment suit, and consequently the undertaking, were void; 2. That the decree of distribution in the matter of the estate of William P. Todhunter was void, and ineffectual to vest in the plaintiffs the interest of deceased in the undertaking; 3. That there was another action pending; 4. That the plaintiffs failed to prove that the amount due had not been paid; and 5. That the court erred in rejecting evidence offered by defendants, and in refusing to permit the defendants to amend their answer.

The last four of these objections will not require an extended consideration. The decree of distribution referred to was entirely regular, and were it otherwise, could not be collaterally attacked by the defendants. The former action pleaded was regularly dismissed before the commencement of this action, under subdivision 1 of section 581 of the Code of Civil Procedure. The costs referred to in that subdivision are the costs of entering the judgment (*Kaufman v. Superior Court*, 115 Cal. 152); and if the judgment be entered by the clerk without payment, its validity cannot be questioned. (*Hinkel v. Donahue*, 90 Cal. 389; Code Civ. Proc., sec. 1908.) It did not devolve upon the plaintiffs, under the pleadings, to prove that the amount due on the undertaking was unpaid. It is so expressly alleged, and not denied. The evidence offered by defendants as to the appointment of receiver, his taking possession of the land, etc., was inadmissible under the pleadings, which admitted the occupation of the defendant, and the value of the use and occupation of the land while so occupied. The refusal of defendants' leave to amend was within the discretion of the court. The amendment was not denied on the ground that it was too late (as claimed by the appellants' counsel), but generally, on the grounds urged in objection, which were, in addition to the motion being too late, that the amendment was not

in writing, and that there was no verification of the facts referred to in it.

The remaining point relates to the judgment in the ejectment suit, which is claimed to be void, on the authority of *McCreery v. Everding*, 44 Cal. 284, and to the validity of the undertaking. But the *dictum* in the case cited has been expressly overruled by the later decisions of *Phelan v. Tyler*, 64 Cal. 82, and *Tyrrell v. Baldwin*, 67 Cal. 2, where it is held that the death of a party pending suit does not oust the jurisdiction of the court, and hence that the judgment is voidable only, not void. This does not mean that a judgment can be really rendered for or against a dead man, but that it can be rendered nominally for or against him, as representing his heirs, or other successors, who are the real parties intended. The undertaking necessarily followed the judgment. (Code Civ. Proc., secs. 941-945; *Walsh v. Soule*, 66 Cal. 443.) Nominally, it was to the deceased plaintiff (with the others), but really it was to his executors; and his interest was, by the decree of distribution alleged in the complaint, assigned to the other plaintiffs.

The judgment and order appealed from should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 927. Department One.—August 26, 1901.]

STOCKTON SCHOOL DISTRICT OF SAN JOAQUIN COUNTY, Respondent, v. E. B. WRIGHT, County Superintendent, etc., Appellant.

SCHOOL FUNDS—STATE AND COUNTY TAXES—SUPPORT OF COMMON SCHOOLS.—The school law contemplates and requires that all school funds raised from state and county school taxes shall be applied exclusively to the support of common schools, consisting of primary and grammar schools in each school district.

ID.—APPORTIONMENT BY COUNTY SUPERINTENDENT—"AVERAGE DAILY ATTENDANCE" IN DISTRICT—SPECIAL SCHOOLS NOT INCLUDED.—The apportionment required to be made by the county superintendent of the unapportioned residue of the school funds "to the several districts, in proportion to the average daily attendance in each district during the preceding year," must be based upon the "average daily attendance" in the common schools of the district, not including attendance upon any high school or evening school established therein.

ID.—STATUTORY CONSTRUCTION—LEGISLATIVE INTENT—ABSURDITY.—In the interpretation of a statute the court must look at the context, and the result that would follow, in order to arrive at the legislative intent. A literal construction will not always obtain, particularly when such construction leads to an absurdity.

APPEAL from a judgment of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion.

A. H. Ashley, for Appellant.

Ed. R. Thompson, and J. G. Swinnerton, for Respondent.

COOPER, C.—This appeal is from a judgment awarding plaintiff a writ of mandate against defendant, in his official capacity, commanding him to apportion to plaintiff \$4,630.13 of public school moneys.

A demurrer was filed to the petition, and upon its being overruled, defendant answered, setting forth facts which are practically conceded to be true. As the facts are substantially agreed upon, it will not be necessary to pass upon the ruling on the demurrer.

Plaintiff is a school district of the county of San Joaquin,

and defendant is the county superintendent of common schools in said county.

The amount of money sought to be apportioned—and which was directed to be apportioned by the judgment—is school money raised by state and county school taxes, and is not money raised by special or high school taxes. It is claimed that it is the duty of defendant, in his official capacity, to apportion the money to plaintiff, under subdivision 4 of section 1858 of the Political Code, which provides that all school money remaining on hand after certain apportionments “must be apportioned to the several districts in proportion to the average daily attendance in each district during the preceding school year.” The question is as to the meaning of the words, “average daily attendance.” Do they mean average daily attendance in the common schools of the district? or do they mean the average daily attendance in all the schools, including the high school and evening schools? It is necessary to consider other sections and provisions of the code and of the constitution, so that the intent of the legislature may be ascertained.

It is provided in section 5 of article IX of the constitution, that the “legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.” Section 6 of the same article provides: “The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and technical schools as may be established by the legislature, or by municipal or district authority; but the entire revenue derived from the state school fund and the state school tax shall be applied exclusively to the support of primary and grammar schools.” The provisions of the Political Code follow in this respect the constitutional provisions. It is conceded by plaintiff that the entire revenue derived from the state school tax must be applied exclusively to the support of primary and grammar schools, and that none of the money here sought to be apportioned can be used for the support of the high school or the evening schools of said district.

Provision is made, in the various sections of the Political Code, for the formation of school districts in the several

counties and cities and counties of the state. It is made the duty of the county superintendent to apportion the school moneys to each school district, as provided in section 1858, at least four times a year. If, in any district, there has been an average daily attendance of only five, or less, during the whole school year, the superintendent shall suspend the district and report such fact to the board of supervisors. (Pol. Code, sec. 1543.) It is the duty of the census marshal of each district to take, annually, a census of all children under seventeen years of age who were residents of the district on the fifteenth day of April preceding the taking of the census. This census must include all children who are absent attending institutions of learning, and whose parents or guardians are residents of the district; the children of Indian parents who pay taxes, and who are not living in the tribal relation; orphan children absent from the district, whose guardians reside in the district; and native-born Chinese children. (Pol. Code, secs. 1634-1637.)

This census is the basis for the apportionment of public school moneys to the various districts. All children who are residents of the district must be counted, even if absent attending some other school. All schools must be opened for the admission of all children between six and twenty-one years of age residing in the district, and must, unless otherwise provided by law, be divided into primary and grammar grades. (Pol. Code, secs. 1622, 1623.)

All state school moneys apportioned by the superintendent of public instruction must be apportioned to the several counties in proportion to the number of school census children between the ages of five and seventeen years, as shown by the returns of the school census marshals of the preceding school year. (Pol. Code, sec. 1858.) After the money is so apportioned to the several counties by the superintendent of public instruction, it is provided that the school superintendent in each county must apportion all state and county school moneys as follows:—

"1. He must ascertain the number of teachers each district is entitled to, by calculating one teacher for every seventy school census children, or fraction thereof not less than twenty school census children, as shown by the next preceding school census; provided, that all children in any asylum, and not attending the public schools, of whom the au-

thorities of said asylum are the guardians, shall not be included in making the estimate of the number of teachers to which the district in which the asylum is located is entitled.

"2. He must ascertain the total number of teachers for the county, by adding together the number of teachers assigned to the several districts.

"3. Five hundred dollars shall be apportioned to each district for every teacher assigned to it; provided, that to districts having ten and less than twenty school census children shall be apportioned four hundred dollars; provided further, that to districts having over seventy school census children and a fraction of less than twenty, there shall be apportioned twenty dollars for each census child in said fraction.

"4. All school money remaining on hand after apportioning to the districts the moneys provided for in subdivision 3 of this section must be apportioned to the several districts in proportion to the average daily attendance in each district during the preceding school year. Census children, wherever mentioned in this chapter, shall be construed to mean those between the ages of five and seventeen years." (Pol. Code, sec. 1858.)

It will be noted that, under subdivision 4 of said section, the entire apportionment by the state superintendent to the counties, and by the county superintendent to the district, refers to census children as those between the ages of five and seventeen years. Each county gets its share of the state school moneys, by counting the census children between the ages of five and seventeen years, whether such children are absent from the county attending other institutions of learning or not. So each district gets its share of the state and county school moneys, under the first, second, and third subdivisions of the section, by reference to the census children, or fraction thereof, whether, such children are absent from the district attending other schools or not. It is therefore evident that it is the purpose of the law that all state and county school moneys shall be used exclusively for the support of the primary and grammar district schools. The proper proportionate amount for each census child of the district is thus intended to be given upon a just representation. Then the remaining moneys on hand must go to the several districts, "in proportion to the average daily attendance in each district for the preceding school year." "Each district" refers to the district schools,—to the primary and

grammar schools. The whole object and intent of the several sections was to provide for the use of the public school moneys in the primary and grammar district schools.

The average daily attendance upon the district school in each district was thought to be a just basis upon which to apportion the remaining moneys. It was not intended to include the average daily attendance in a high school or evening school, which was not entitled to any of such school moneys. This would be representation without taxation. If no part of the moneys can be used for such high school or other institution of learning in the district outside of the primary and grammar schools why should such average daily attendance be counted? It can readily be seen that two adjoining districts of a county might have precisely the same average daily attendance upon the primary and grammar schools of each district; in one district there might be high schools and evening schools with three times as great an average daily attendance as the district school. Under respondent's contention, the district with such high school and evening schools located therein would receive four times as much money as the other district. This money would have to be used for the primary and grammar schools of the district, thus giving each school child in the fortunate district four times as much money for his education as the less fortunate child in the other district would receive. The legislature never contemplated any such absurd result. While it is not the business of the court to make a statute, yet in the interpretation thereof it must look at the context and the result that would follow, in order to arrive at the intent. A literal construction will not always obtain, particularly when such construction leads to an absurdity. (*People v. Craycroft*, 111 Cal. 544.)

We advise that the judgment be reversed and the court below directed to dismiss the proceedings.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the court below directed to dismiss the proceedings.

GAROUTTE, J., Van Dyke, J., Harrison, J.

[Crim. No. 764. In Bank.—August 26, 1901.]

Ex parte ANDREW ANDERSON, on Habeas Corpus.

COUNTY GOVERNMENT ACT—INVALID SECTION FOR ORDINANCES OF ELECTORS.—Section 13 of the County Government Act of 1897 (Stats. 1897, p. 454), permitting the electors of the county to frame and pass ordinances for the government of the county, "having the same force and equal effect as though adopted and ordained by the board of supervisors," is inconsistent with the legislative power granted under our system of government to the board of supervisors, and is invalid and void. [Beatty, C. J., dissenting.]

ID.—CONSTITUTIONAL LAW—SYSTEMS OF COUNTY GOVERNMENT—COORDINATE LAW-MAKING POWERS.—Without deciding whether the legislature may confer local law-making power directly upon the people, it cannot establish two equal co-ordinate law-making powers, under the system of county government provided for in the constitution. Under the constitution and the County Government Act, the legislative power conferred upon the board of supervisors must be preferred to an inconsistent law-making power conferred upon the electors of the county.

HABEAS CORPUS in the Supreme Court to test the validity of an ordinance of Ventura County passed by vote of the electors of the county.

A conviction of the petitioner was had in the justice's court of Saticoy township, before W. D. Wright, justice of the peace for alleged violation of an ordinance entitled "An ordinance prohibiting the business of selling and the sale of vinous, spirituous, distilled, malt, mixed, and other intoxicating liquors within the county of Ventura," etc., purporting to be an ordinance of said county, "under and in accordance with the provisions of section 13" of the County Government Act of April 1, 1897. The writ of *habeas corpus* was directed to the sheriff of the county of Ventura.

H. L. Poplin, for Petitioner.

S. M. Swinnerton, *amicus curiae*, also for Petitioner.

F. W. Ewins, District Attorney of Ventura County, for Respondent.

C. C. Wright, E. C. Bower, and Lewis W. Andrews, *amici curiae*, also for Respondent.

HENSHAW, J.—Petitioner was convicted of violating an ordinance of the county of Ventura, adopted by a vote of the electors of the county at an election held in November, 1900, under the provisions of section 13 of the County Government Act of 1897 (Stats. 1897, p. 454). He contends that the ordinance under which his conviction was had is unconstitutional and void.

Section 1 of article XI of the constitution reads as follows: "The several counties, as they now exist, are hereby recognized as legal subdivisions of this state."

Section 4 of article XI of the constitution provides that "the legislature shall establish a system of county governments which shall be uniform throughout the state."

Section 5 of article XI of the constitution ordains that "the legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, [etc.,] and shall prescribe their duties, and fix their terms of office."

Section 11 of article XI of the constitution declares that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

Section 1 of the County Government Act of 1897 provides that "the several counties of this state, as they now exist, . . . are bodies corporate and politic, and, as such, have the powers specified in this act, and such other powers as are necessarily implied." By section 2, "their powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law"; and by subdivision 25 of section 25, boards of supervisors are empowered "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law," etc.; while, by subdivision 31 of the same section, boards of supervisors are authorized "to make and enforce, within the limits of their county, all such local, police, sanitary, and other regulations as are not in conflict with general laws."

While thus defining the powers of boards of supervisors as the constitution enjoins upon the legislature to do, concurrently, in the same act, and by section 13 thereof, the legislature declares: "Whenever there shall be presented to the board of supervisors a petition or petitions, signed by legal voters of said county, equal in number to fifty per cent of

the votes cast at the last preceding election, asking that an ordinance, to be set forth in such petition, be submitted to a vote of the qualified voters of such county, it shall be the duty of the board of supervisors, by proclamation, to submit such proposed ordinance to the vote of the qualified electors of such county. Such election shall be held within thirty days after the first regular meeting of the board after the filing of such petition. The ballots used at such special or general election shall contain the words, 'For the ordinance' (stating the nature of the ordinance), and 'Against the ordinance' (stating the nature of the ordinance). The election shall be conducted and the returns canvassed in all respects as provided by law for the conducting of general elections and the canvassing the returns thereof. . . . If a majority of the votes cast upon such ordinance shall be in favor of the adoption thereof, the board of supervisors shall proclaim such fact, and upon the publication of such proclamation such ordinance, thus adopted, shall have the same and equal force and effect as though adopted and ordained by the board of supervisors."

The license, for a violation of the terms of which this petitioner was convicted, was a license regulating the sale of intoxicating liquors, and was adopted in accordance with this last-quoted section. At the time of its adoption there was an ordinance covering the same subject-matter regularly passed by the board of supervisors of the county.

The legislative design disclosed by section 13 of the County Government Act is clear and unmistakable. It is a direct grant of power to the voters of a county, or rather to a majority of such voters as may choose to exercise their right of franchise at an election, to pass any and all ordinances pertinent to the government of their county. The petitioners frame and present, without interference from or control by the board of supervisors, the precise ordinance or ordinances which they may desire to have adopted, and those ordinances as presented, if they meet with popular favor, are declared to be and to become valid ordinances of the county, "having the same and equal force and effect as though adopted and ordained by the board of supervisors."

With this for the manifest purpose and object of the law, two questions present themselves: 1. Can the legislature confer directly upon the electors of a county the power to make its laws? and 2. Is the exercise, by the legislature, of

this attempted power, manifested in section 13 of the County Government Act, valid and legal?

1. Under the views which we hold, it is perhaps unnecessary to decide the first of these questions, but it may be remarked, that, while the state recognizes in various forms the right of the electors to a voice in controlling the subject-matter of legislation, this is the first instance where the absolute and uncontrolled power of legislation is taken away from the legislative body, in which heretofore it has always been confided, and has been bestowed upon the electors. And further, it may be remarked that there is nothing in the constitution of the state expressly authorizing this kind of legislation. Constitutional amendments are submitted for approval or rejection to the voters of the state, but the form and substance of the amendments have first been determined by the regularly authorized law-making power. Upon the question of bonded indebtedness, and upon the question of amendments of their charters, the voters of a municipality are allowed a determinative voice; but the matter of the amendment, and the terms of the bonded indebtedness, and the purposes for which it shall be incurred, are all first the subject-matters of legislative review by the law-making power of the municipality,—its board of trustees or city council. Even in *Ex parte Wall*, 48 Cal. 279, the law under consideration only authorized the electors of the township, city, or town to petition the board of supervisors to call an election, at which there should be obtained an expression of the voters upon the question of licensing or not licensing the liquor traffic, and it was provided that if a majority of the votes cast were “for no liquor license,” then no license should be granted within such township, city, or town. The decision of this court was against the validity and constitutionality of the act, yet it will be observed that the law there under consideration was of very limited scope and applicability. It was a so-called “local-option law,” whereby, if the voters decided against licensing the liquor traffic, no license was to be issued, but if, upon the other hand, their decision was in favor of licensing the liquor traffic, it was still left to the law-making power to prescribe, by appropriate ordinance, the terms and conditions regulating the business. In the case at bar, however, it is to be borne in mind that the right to make any and all laws, such as heretofore the supervisors

could make, is directly conferred upon the people. That this is a startling innovation upon the governmental system recognized in this state since its earliest existence, is at once apparent. But whether or not the legislature has the power so to do is a question the determination of which may well be deferred until some later occasion, in view of the fact that its attempted exercise of that power in this instance is clearly invalid. It will call for determination when the question is fairly presented under legislation well advised and maturely considered. It need not here be passed upon, for the reason that this drastic departure from our form of government finds expression only in imperfect and incomplete legislation, embodied in a single clause of the County Government Act.

2. For, if it be conceded (as here it may be, though it should be distinctly added that the concession is not a determination of the first proposition) that the legislature has the power which it has attempted to exercise, it is too plain to permit of argument, that, under our system of government, there never can be two equal, co-ordinate law-making powers, each existing without any restrictions the one upon the other. Yet such is the precise case presented, and apparent from an inspection of the sections of the constitution and of the County Government Act above quoted. Upon the one hand, there is conferred upon the board of supervisors, as has been the universal rule, full power to make all laws pertaining to the government of the county. Upon the other hand, this identical power is bestowed by the machinery of the ballot upon the voters of the county. When an ordinance is thus passed by ballot, it has no superior force, but has merely "the same and equal force and effect as though adopted and ordained by the board of supervisors." The right of the supervisors to repeal such ordinances is not taken away, and it is within their power to repeal them one after the other as soon as they shall have been adopted. Upon the other hand, it is equally the right of the people to re-enact them after such repeal. It is the old problem of the irresistible force meeting the indestructible barrier. So far as legislation is concerned, nothing could result but untold confusion. As the two sets of laws, thus creating co-ordinate law-making powers, without check, limitation, or restraint, the one upon the other, cannot, in the nature of our government, exist, it

follows that one or the other of the provisions is invalid and must fall. There can be no hesitation in declaring, in this case, that it must be section 13 of the County Government Act.

By reason of the invalidity of said section, the ordinance adopted in accordance with it is likewise invalid, and the petitioner is entitled to his discharge. It is ordered accordingly.

McFarland, J., Harrison, J., and Temple, J., concurred.

VAN DYKE, J., concurring.—I concur. When the constitution says that any county, city, etc., may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general law, it uses the terms "counties" and "cities" in their organized condition, or as bodies politic; it does not mean that the people of the county or of the city, in their individual capacity, may do these things.

The terms employed in framing a constitution or in the enactment of laws by the legislature are to be construed as they were generally understood at the time. Our system of government is not that of a pure democracy, but it is a representative republic. This holds throughout, from the smallest subdivision, such as cities and towns, up through counties and states, to the federated or national government. The people, in their individual capacity, do not make or enforce laws to govern them, but they delegate the power to their agents to make laws, and also to construe and enforce them. The power to enforce is coupled with the power to make local, police, and sanitary regulations, recognizing the obvious fact that laws are useless unless they can be enforced. No one will pretend that the people of the county, in their individual and unorganized condition, can enforce any legislative act or ordinance; that must be done by and through the proper officers and agencies recognized by the constitution and general laws of the state. Under the rule, *Expressio unius est exclusio alterius*, the legislature has no authority to create any other public, corporate bodies or agencies than those specified in the constitution, and clothe them with the power to make and enforce local, police, sanitary, and other regulations. (*Ex parte Werner*, 129 Cal. 567.)

Garoutte, J., concurred in the concurring opinion.

BEATTY, C. J., dissenting.—I dissent. The constitution (art. XI, sec. 11) makes a direct grant to every county of the power to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This grant to the counties of the power of local legislation is, of course, a grant to the people of the respective counties. How they are to exercise the power, whether in their primary capacity by voting at the polls, as in the case of the adoption of a state constitution or of amendments thereto, or by their chosen representatives in boards of supervisors, is purely a matter of legislative regulation, and I cannot see how it is possible, upon any recognized principle of constitutional construction, to deny to the legislature the power to confer upon the qualified voters of the respective counties the right to make local laws which will be valid and effective within their territorial limits.

That the legislature did intend by the act of 1897 to enable the people of the respective counties to enact local ordinances by popular vote is not, and cannot be, denied; but their intention is held to have failed, because they have left it in the power of the boards of supervisors to repeal or alter or supersede the ordinances ratified by popular vote. I do not agree with this construction of the act; but if it were conceded to be correct, or if the legislature had incorporated in the act, in express terms, what the court construes it to mean,—if, in other words, the legislature, instead of stopping with the declaration that "such ordinance, thus adopted, shall have the same and equal force and effect as though adopted and ordained by the board of supervisors," had added an express proviso that the board of supervisors might, in their discretion, alter or repeal ordinances so adopted,—I am not aware of any rule of construction or principle of constitutional law upon which a court could declare the law invalid. It might well be argued that such a law would be inexpedient, or even foolish, but laws cannot be invalidated upon that ground. They are only invalid when the legislature has exceeded its powers in attempting to enact them. Here, upon the construction given to this law, there is no excess of power,—only an absurdity, or supposed absurdity, in the possible consequences to which it may lead. This, however, I conceive to be a more potent argument against the construction placed upon the act, than against the power of the legislature to pass it.

And finally, are the possible consequences of the court's construction of the law so very absurd? Suppose the board of supervisors has the power to repeal an ordinance which has been ratified by popular vote. It is a power which, it may be presumed, will not be exercised in any case of doubtful expediency. The expression of the popular will would have a moral and practical force in any event, and in many cases would operate permanently. As to the confusion and uncertainty which it is feared might result, I see no reason for apprehension. It is conceivable, of course, that there would sometimes be found a board of supervisors determined to thwart the will of the people of their county, and that they would repeal ordinances as fast as the people could pass them, but this, it may be safely asserted, would rarely occur, and in such rare instances the mischief would be less in degree than frequently follows when the legislature undoes what its predecessors have done.

I think the ordinance is in every respect valid, and the prisoner should be remanded.

[L. A. No. 961. Department Two.—August 30, 1901.]

THOMAS F. TEDFORD, Respondent, v. LOS ANGELES
ELECTRIC COMPANY, Appellant.

MASTER AND SERVANT—DUTY OF EMPLOYER—SUITABLE APPLIANCES—

WARNING TO INEXPERIENCED EMPLOYEE.—It is the personal duty of an employer to furnish his employee with suitable appliances, and to warn an inexperienced employee, who is put at dangerous work, requiring the exercise of skill, of the dangers attending such work, of which the employer is aware, and the employee is ignorant.

ID.—DELEGATION TO SUPERIOR FELLOW-SERVANT—VICE-PRINCIPAL.—The employer cannot escape responsibility for neglect of any of the duties personally imposed upon him, by delegating them to a superior fellow-servant. The fellow-servant, in such case, becomes a vice-principal, who represents the employer.

ID.—NEGLIGENCE—INJURY FROM LIVE ELECTRIC WIRE—INEXPERIENCED LINEMAN—NEGLECT OF SUPERIOR FELLOW-SERVANT.—An electric company is responsible for injury from a live electric wire to an inexperienced servant, who had never performed the work of a "lineman," which required great skill, and to which he was as-

signed by a superior fellow-servant, and required to ascend a pole and scrape the wire, without being furnished with rubber gloves, or other protective appliances used by linemen, and without any instruction or warning as to the dangers attending the work, of which he was ignorant.

ID.—EXCESSIVE VERDICT.—Where it cannot be said, as matter of law, that the verdict for damages awarded by the jury is excessive, it cannot be disturbed upon appeal, although it appears large, and it may seem that a smaller amount would be more just.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Gibbon, Thomas & Halstead, Cheney & Taylor, and J. W. McKinley, for Appellant.

The plaintiff was injured by the neglect of a fellow-servant, and cannot recover. (*McLean v. Blue Point Gravel Mining Co.*, 51 Cal. 255; *Fagundes v. Central Pacific R. R. Co.*, 79 Cal. 97; *Alaska Mining Co. v. Whelan*, 168 U. S. 88; *Daves v. Southern Pacific Co.*, 98 Cal. 19;¹ *Long v. Coronado R. R. Co.*, 96 Cal. 269; *Mast v. Kern*, 34 Or. 247;² *Stevens v. San Francisco etc. R. R. Co.*, 100 Cal. 554; *Trewatha v. Buchanan Gold Mining etc. Co.*, 96 Cal. 495; *Central R. R. Co. v. Keegan*, 160 U. S. 259; *Martin v. Atchison etc. R. R. Co.*, 166 U. S. 399; *Donovan v. Ferris*, 128 Cal. 48;³ *Callan v. Bull*, 113 Cal. 602.) Whether the injury was received from a fellow-servant is a question of law to be determined by the court and not by the jury. (*Donnelly v. San Francisco Bridge Co.*, 117 Cal. 424; *Callan v. Bull*, 113 Cal. 593; *Crispin v. Babitt*, 81 N. Y. 516;⁴ *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70.⁵)

Henry T. Gage, and W. I. Foley, for Respondent.

There was the neglect of the personal duty of the employer to warn the plaintiff, as an inexperienced servant, of unknown peril, attending the employment to which he was put. (Shearman and Redfield on Negligence, 3d ed., sec. 203; *Ingerman v. Moore*, 90 Cal. 420;⁶ *Ryan v. Los Angeles I. & C. S. Co.*, 112 Cal. 244, 253; *Gibson v. Sterling Furniture Co.*, 113 Cal. 6; *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 523; *Foley v. California Horseshoe Co.*, 115 Cal. 195;¹

¹ 35 Am. St. Rep. 133.

² 75 Am. St. Rep. 580, and note.

³ 79 Am. St. Rep. 25.

⁴ 37 Am. Rep. 521.

⁵ 38 Am. St. Rep. 396.

⁶ 25 Am. St. Rep. 138.

Hanley v. California B. & C. Co., 127 Cal. 232; *Higgins v. Williams*, 114 Cal. 182.) The personal duties of the master are non-transferable, and that liability remains even after the delegation of their performance to a superintendent, agent, or fellow-servant. (*Daves v. Southern Pacific Co.*, 98 Cal. 24;¹ *Mullin v. California Horseshoe Co.*, 105 Cal. 77; *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 524; *Callan v. Bull*, 113 Cal. 600; *Higgins v. Williams*, 114 Cal. 181.) Where a servant is transferred to new duties, and the risks are more hazardous than the servant has a right to expect, he does not assume such risks, and the omission of the defendant to instruct or warn him is actionable negligence. (*Clark v. Liston*, 54 Ill. App. 578; *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915; *Burke v. Anderson*, 69 Fed. Rep. 814; 34 U. S. App. 132; 16 C. C. A. 442.) The question as to whether a superior servant is a fellow-servant or a vice-principal is one of fact to be determined by the jury, under proper instructions. (*Wilson v. Charleston etc. Ry. Co.*, 51 S. C. 79; *Loughlin v. State*, 105 N. Y. 159; *Blackman v. Thomson-Houston Electric Co.*, 102 Ga. 64.)

McFARLAND, J.—This is an action to recover damages for personal injuries, alleged to have been suffered by plaintiff through the negligence of defendant. The jury returned a verdict for the plaintiff in the sum of fifteen thousand dollars. Defendant appeals from an order denying his motion for a new trial.

Defendant is a corporation engaged in furnishing, carrying, and distributing electricity through the city of Los Angeles, for lighting, motive power, etc., over poles and running wires, along the streets and public places of said city.

Plaintiff was an employee of defendant, and at the time when the injuries complained of were received was at work about eighteen feet above the ground, on one of the poles of defendant's system. He was standing on a small platform attached to the pole, and was engaged in scraping one of the wires, when he suddenly fell to the ground and was badly injured. It is not contended that the place where plaintiff was working was unsafe on account of its height or for any defect in the platform. It is averred, however, in the complaint that his fall was caused by a strong electrical shock, which rendered him unconscious and threw him backwards

¹ 56 Am. St. Rep. 87.

² 35 Am. St. Rep. 133.

to the ground; and there was sufficient evidence to warrant the jury in finding that this averment was true. At the time of the action, plaintiff was working under the directions of one Burge, who was a foreman in charge of a gang of men of which plaintiff was one, and at this time Burge was himself working on the same pole, several feet above the platform on which plaintiff stood. The evidence does not make it entirely clear how the current of electricity came in contact with plaintiff's person. It is averred in the complaint that at the time plaintiff reached the platform there was a strong current running, at that point, through the wires, parts of which were not insulated. Defendant contends that this was not true; that the wires then were all "dead"; and that if plaintiff was touched by a current at all, such current was turned on afterwards by the said Burge; and therefore defendant contends that if plaintiff was injured at all by a current of electricity which was negligently permitted to pass through the wires where he was working, the negligence was that of Burge; that the latter was a co-employee and fellow-servant with plaintiff; and that plaintiff cannot recover of the employer, the defendant, for injuries caused by the negligence of the fellow-servant, Burge. There is no doubt that plaintiff and Burge were, in a general sense, fellow-servants. This relation between them was not changed by the fact that Burge occupied a superior position in the general service. (*Donovan v. Ferris*, 128 Cal. 48,¹ and cases cited.) If, therefore, plaintiff was injured by the negligence of Burge, and the negligence did not involve a duty which the defendant, as employer, owed personally to plaintiff as employee, then the offending fellow-servant was alone responsible, and the judgment against defendant was unwarranted, as there is no claim that there was any want of care in selecting Burge, or that he was in any way incompetent.

But there are certain duties which an employer owes personally to his employees, and he cannot avoid responsibility for injury to one servant, caused by the failure to perform such duties by delegating their performance to another servant. In such case the fellow-servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer,—sometimes called a vice-principal. In such case the negligence of the servant is the negligence of the principal, for

¹ 79 Am. St. Rep. 25.

which the latter must answer. (See *Daves v. Southern Pacific Co.*, 98 Cal. 13;¹ *Callan v. Bull*, 113 Cal. 593; *Elledge v. National etc. R. R. Co.*, 100 Cal. 282;² *Nixon v. Selby etc. Co.*, 102 Cal. 458.) Some of such duties well established in the law are, to furnish proper machinery and appliances and keep them in repair, to exercise care in selecting competent servants, to take reasonable care for the safety of the employees, etc. It is also one of these duties to give careful instructions, directions, and warnings to a youthful or inexperienced servant of unusual and hidden dangers, of which the employer is aware, and of which the servant, to the employer's knowledge, is ignorant. (*Ingerman v. Moore*, 90 Cal. 410,³ and authorities cited; *Ryan v. Los Angeles etc. Co.*, 112 Cal. 244; *Gibson v. Sterling Furniture Co.*, 113 Cal. 1; *Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517; *Higgins v. Williams*, 114 Cal. 176; *Mullin v. California Horseshoe Co.*, 105 Cal. 77; *Henley v. California etc. Co.*, 127 Cal. 232.) And in such case the employer cannot escape the responsibility by delegating this duty to a fellow-servant of the person injured. (See cases above cited.) Now, in the case at bar it is averred in the complaint that plaintiff was employed by defendant as a common, unskilled laborer, to do "the ordinary work of digging holes for electric poles, repairing electric poles, driving a horse and wagon, and in performing other street-work for the maintenance of said poles and wires used in said business of the defendant, and said work was not of a skilled kind, nor was said work of a dangerous character." It is further averred that the work of a "line-man" in defendant's business required great skill and care, and was of a dangerous character; that the dangerous character of such work was well known to defendant, but that plaintiff was wholly unacquainted with the duties and dangers of such work, and wholly unskilled therein,—“all of which was at all times herein stated known to said defendant, and said plaintiff did not know, nor was he ever informed by said defendant, nor by any one else, of the dangerous character of such work, nor of the risk incident thereto.” And it is further averred that, being thus, to defendant's knowledge, inexperienced, and ignorant of the dangers of the work of a lineman upon wires, he was, without any instructions or warning, and without being furnished with rubber gloves or other protective appliances used by linemen, negligently

¹ 35 Am. St. Rep. 133.

² 25 Am. St. Rep. 138.

³ 38 Am. St. Rep. 290.

ordered by defendant to ascend said pole and scrape the wires. While there was some conflict in the testimony as to some of these averments, there was sufficient evidence to warrant the jury in finding that they were true. And this being so, it was the duty of defendant to inform and warn plaintiff of the peril to which he ignorantly exposed himself by coming in contact with an invisible and dangerous electrical current. The contention, therefore, that, under the law, the verdict was not warranted by the evidence cannot be maintained.

There are a number of exceptions to instructions given by the court on its own motion; to instructions given at the request of plaintiff; and to the refusal of instructions asked by defendant. We do not, however, deem it necessary to discuss these instructions in detail. If the law be as above stated,—that is, if the duty to instruct and warn plaintiff as above stated was a duty which defendant personally owed to plaintiff, and which it could not avoid by delegating it to Burge,—then the rulings of the court in giving and refusing instructions were correct. The main objection made by defendant to these rulings is, that they should have been made upon the theory that Burge and plaintiff were fellow-servants, and that the general rule as to injuries caused by the negligence of a fellow-servant should be rigidly applied to the case at bar, and that defendant was not responsible if Burge neglected to inform and warn plaintiff of the dangers, to him unknown, to which a compliance with Burge's order exposed him. In the instructions on other points we see no error. Questions of fact were properly submitted to the jury.

It is strenuously contended that the verdict is excessive. The amount of damages awarded by the jury was, under the circumstances, quite large; a smaller amount would, perhaps, have been more just; but we cannot say that, as a matter of law, the verdict should be set aside on the ground of excessive damages.

The order appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[L. A. No. 900. Department Two.—August 30, 1901.]

CLARENCE J. BERRY et al., Appellants, v. A. P. EYRAUD et al., Respondents.

ESTATES OF DECEASED PERSONS—POSSESSION OF REALTY—RIGHTS OF HEIRS.—Though the heirs of a deceased person, prior to distribution, have no right of possession and control of the realty as against the administrator, yet, as against strangers who do not claim under the administrator, the heir is entitled to the possession of lands belonging to the estate.

ID.—UNDIVIDED INTEREST—DISTINCT LEASES BY DIFFERENT HEIRS—OIL LEASE—COVENANT AGAINST SALOON—LEASE FOR SALOON.—Where the decedent owned an undivided third interest in land, and one heir only joined with the other owners in a lease thereof as oil-land, covenanting with the lessees not to build a saloon thereupon, the remaining heirs are entitled to be let into possession jointly with the lessees, who do not claim under the administrator, and may lease to third parties the right to build a saloon upon the premises, which does not directly disturb the operations of the first lessees.

ID.—INJUNCTION—MENACE TO OIL PROPERTY.—Whatever rights of injunction the first lessees may have against their lessors for breach of their covenant, they cannot enjoin the lessees of the other heirs from maintaining the saloon, on the alleged ground that it is a menace and danger to their oil-tanks and other inflammable property, with which it does not directly interfere.

APPEAL from an order of the Superior Court of Kern County refusing a temporary injunction. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

C. Linkenbach, for Appellants.

T. M. McNamara, and J. W. P. Laird, for Respondents.

TEMPLE, J.—Appeal from an order refusing a temporary injunction.

The plaintiffs are lessees of a tract of land in Kern County. The land belonged, in equal shares, to Andre Castagnetto, B. W. Jauchins, and the estate of Joseph Queirolo, then recently deceased. At the time of the execution of the lease under which plaintiffs claim, the estate was not in probate. The heirs of Joseph Queirolo were one son and two daughters, all over the age of majority. The lease was executed by Jauchins, Castagnetto, and C. A. Queirolo, son of Joseph Queirolo, but not by the daughters of Joseph Queirolo.

Subsequently to the lease, April 17, 1899, letters upon the estate of Joseph Queirolo were issued to C. A. Queirolo. There was evidence before the court that notice to creditors had been duly given, that there were no debts, and that the estate was ready for settlement and distribution, if the parties interested desired that the administration should be closed.

The land was leased as oil-land, and plaintiffs were proceeding to mine for oil, when the defendants entered and set up a saloon, claiming under a lease made by the two daughters of Joseph Queirolo, deceased, who had not joined in the lease to plaintiffs. The defendants have not disturbed the plaintiffs in their operations, except that it is charged that the existence of the saloon on the premises is a constant menace and danger to the oil-tanks and other property of plaintiffs, which is quite inflammable.

Neither party claims under the administrator, nor has the probate court authorized a lease to be made by him. As against strangers, the right of the heir to the possession of lands belonging to the estate has been expressly recognized. (Code Civ. Proc., secs. 1452, 1581; *Spotts v. Hanley*, 85 Cal. 155; *Jordan v. Fay*, 98 Cal. 264; *Estep v. Armstrong*, 91 Cal. 659.)

No doubt, as contended by appellants, the administrator has the right of possession and control, as against the heirs, during the administration, and I agree with appellants, that it cannot be shown that this right to possession has been lost because the purposes of administration have been accomplished and the estate is ready for distribution. Ordinarily, under such circumstances, the right of the heir is, to force a settlement and distribution. But he cannot oust the administrator from the possession upon the ground that he unduly delays to close the administration.

The defendants are therefore entitled, under their lease, to be let into possession, jointly with plaintiffs, to the extent of the interest of their lessors, so far as authorized by the terms of their lease. It is of no importance, therefore, to determine whether the supposed guaranty against the erection of saloons on the premises contained in their lease would warrant an injunction to prevent its violation against the lessors of plaintiffs.

The order is affirmed.

McFarland, J., and Henshaw, J., concurred.

[L. A. No. 815. Department Two.—August 30, 1901.]

MARY MATTHEWS, Executrix, etc., Respondent, v.
HENRY ORMERD, et al., Appellants.

MORTGAGE—COTEMPORANEOUS INSTRUMENT—VOID CONTRACT—PAYMENT OF MORTGAGE TAX—FORFEITURE OF INTEREST.—Where a note and mortgage bore interest at one per cent per month, a cotemporaneous instrument, signed by the mortgagee, agreeing to exact no more interest than eight per cent per annum, and to refund all interest paid over eight per cent, after he had paid the mortgage tax out of said one per cent per month, is to be construed as one with the note and mortgage, and as constituting an agreement that the mortgagors would pay the mortgage tax, not exceeding four per cent upon the amount of the note, in addition to the exacted interest of eight per cent. Such contract is void, under section 4 of article XIII of the constitution, and forfeits all unpaid interest upon the note and mortgage.

ID.—PAYMENT OF TAXES BY MORTGAGORS—CREDIT UPON MORTGAGE.—Where the taxes upon the mortgage were in fact paid by the mortgagors out of their own money, and the mortgagee simply remitted the four per cent of interest-money to the mortgagors, the mortgagors are entitled to be credited upon the mortgage with the amount of taxes paid by them; and the mortgagee is not entitled to recover the unpaid interest.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Edwin A. Wells, and George H. P. Shaw, for Appellants.

Lloyd & Wood, Campbell, Fitzgerald, Abbott & Fowler, Metcalf & Metcalf, and V. E. Shaw, for Respondent.

Goodfellow & Eells, *amici curiae*, also for Respondent.

TEMPLE, J.—Appeal from the judgment and from an order denying a new trial.

The action is to foreclose a mortgage given to secure a note dated September 25, 1893, for five thousand five hundred dollars, due in one year, with interest at the rate of one per cent per month. The answer admits all the allegations of the complaint, except the allegation that no part of the principal

has been paid, and sets up another instrument, in writing, which, it is averred,—and so the court found,—was executed by the mortgagee and delivered to the mortgagors at the same time the note and mortgage were executed, and as part of the same transaction. The writing is as follows:—

“Whereas, Henry and Mary Jane Ormerd, of San Diego, California, have this day, by their attorney in fact, Jeremiah Browell, executed to me their note and mortgage for the sum of \$5,500.00, payable in one year, with interest at one per cent per month, now, this is to certify that I will only exact upon said note and mortgage interest amounting to eight per cent per annum, and I agree to refund to said parties all interest paid me by them over and above eight per cent per annum after I have out of said one per cent per month paid the mortgage tax.

“H. MATTHEWS.

“SAN FRANCISCO, CAL., September 26, 1893.”

Upon the matter of the payment of the taxes, it was agreed, in substance, at the trial, that the mortgagors paid the taxes and that plaintiff refunded to defendants the excess above eight per cent interest he had received. Counsel, at the trial, stated the mode a little differently. Counsel for plaintiff said, “Mr. Matthews sent the money down here to pay these taxes to Mrs. Ormerd and out of the money sent by Mr. Matthews to Mrs. Ormerd, the four per cent, she paid the taxes, sent the receipt to him, and retained the balance of the four per cent.”

“*Mr. Wells.*—That is substantially true. Mrs. Ormerd paid the taxes out of her own money first, and subsequently Mr. Matthews refunded the four per cent in excess of the eight per cent.”

It was further stipulated that the amount of taxes so paid was \$800.13, on the mortgage interest, “and that plaintiff has remitted to the defendant four per cent of the twelve per cent which he had received.”

Whichever way the matter is stated, the effect is the same. The plaintiff received eight per cent per annum interest upon his loan, and the mortgagors paid the taxes. The instruments must be construed as one, and although the note called for twelve per cent, in another part of the same contract the mortgagee agreed that he would exact only eight per cent per annum, and would refund all over that amount after deducting the taxes. This was what was done year by year,

only Mrs. Ormerd first paid the taxes, and then plaintiff refunded the four per cent paid as interest. It was as plainly an agreement for interest at eight per cent, and that the mortgagors would pay the taxes, not exceeding four per cent, upon the amount of the note, as though the contract had been so expressed.

Defendants contend that no interest should be allowed after August 25, 1898, to which time the interest was paid, and that they are entitled to a credit for the amount of taxes paid on the interest of the mortgagee in the mortgaged premises, which, at the time of the rendition of judgment, was stipulated to be the sum of \$800.13.

The constitution provides (art. XIII, sec. 4) that a mortgage shall, for the purposes of assessment and taxation, "be deemed and treated as an interest in the property affected thereby," and that the value of the property, less the value of the security, shall be assessed and taxed to the owner, and the value of the security shall be assessed and taxed to the owner thereof. Either party may pay the taxes; if paid on the property by the owner of the security, the tax shall become a part of the debt secured. If the tax on the security is paid by the owner of the property,—the mortgagor,—it shall constitute a payment. The next section makes void any contract which requires the mortgagor to pay the tax on the interest of the mortgagee.

That the mortgagor is directly required to pay the tax on the security to the extent of one-third of the rate of interest called for by the note, could hardly be made more evident than it is upon the face of the papers. It is a very thin disguise, if disguise it can be called, to require the debtor to pay an additional four per cent, out of which the lender will pay the tax on his interest in the property, returning the balance to the borrower.

The real contention here is, that this palpable evasion, or rather plain violation, of the constitutional provision has been sanctioned by this court in *Hewitt v. Dean*, 91 Cal. 5; *California Savings Bank v. Webber*, 110 Cal. 538; and in *Daw v. Niles*, 104 Cal. 106. In this counsel are mistaken.

Before considering these authorities it may be remarked that a similar question was passed upon in *Burbridge v. Lemmert*, 99 Cal. 493. The device to evade the prohibition of the

constitution was, to have the agreement to repay the taxes to the lender in a separate instrument, with distinct security. The idea was, that the constitutional provision will be strictly construed, and will not be applied to a case not clearly coming within the letter of this provision against usury. Nevertheless, the penalty of loss of interest was exacted in the action to foreclose the mortgage.

In *Hewitt v. Dean*, 91 Cal. 5, an independent instrument was executed by the lender, agreeing to deduct $2\frac{1}{2}$ per cent of the $12\frac{1}{2}$ per cent, if tax receipts were presented him by the borrower. This was declared lawful, on the express ground that it imposed no obligation upon the mortgagor, and therefore did not violate the constitutional prohibition. In the present case the mortgagor was obligated to pay the taxes in addition to the interest; for, in the contract, the lender expressly stipulated that he would not exact more than eight per cent for interest. For a construction of *Hewitt v. Dean* 91 Cal. 5, see *Harralson v. Barrett*, 99 Cal. 607.

In *California Savings Bank v. Webber*, 110 Cal. 538, the rule announced in *Hewitt v. Dean*, 91 Cal. 5, was followed without comment.

In *Daw v. Niles*, 104 Cal. 106, the contract in regard to the taxes was not in writing, and it was held that it imposed no obligation upon the debtor to pay the taxes. The point of the decision seems to be, that the obligation, which, under the constitutional provision, will deprive the lender of interest, must be one which would have been valid and enforceable but for this provision. Certainly, this case answers that test.

It must follow that defendants were entitled to a credit of the amount paid by them as taxes upon the security, and plaintiff was not entitled to recover the unpaid interest.

The specifications of the particulars in which the evidence was claimed to be insufficient are ample, under the ruling made in *American Type Founders Co. v. Packer*, 130 Cal. 459.

The judgment is reversed and a new trial ordered.

McFarland, J., and Henshaw, J., concurred.

A petition for a hearing in Bank was filed and denied, and the following opinion was rendered thereon on the 28th of September, 1901:—

THE COURT.—A rehearing is denied, but since some apprehension has been expressed that the opinion rendered may be understood as overruling the cases of *Hewitt v. Dean*, 91 Cal. 5, *Daw v. Niles*, 104 Cal. 106, and *London etc. Bank v. Bandmann*, 120 Cal. 220¹, we take occasion to say that such is not the intention. The case in hand is distinguished from these cases. We find no intimation in the opinion to the effect that they are overruled.

[Sac. No. 782. Department Two.—August 31, 1901.]

ELLEN SHERIDAN, Respondent, v. PETER SHERIDAN, Appellant.

DIVORCE—DESERTION—SUFFICIENCY OF COMPLAINT—ABSENCE OF DEMURRER—OBJECTION UPON APPEAL.—A complaint for divorce by a wife against her husband, alleging that on a certain day the defendant voluntarily separated himself from the plaintiff, without any fault on her part, and with intent to desert her, and has continued since, and still does continue, to desert her, in the absence of a demurrer for a defective statement of the facts, is not subject to the general objection, upon appeal, that it does not state a cause of action for desertion.

APPEAL from a judgment of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

J. G. Swinnerton, for Appellant.

The complaint is insufficient, because it does not allege that the separation was against the wish or consent of the plaintiff. (Civ. Code, sec. 99.)

Budd & Thompson, for Respondent.

The complaint charges voluntary separation by the defendant with intent to desert and actual and intentional desertion. The word "desertion" implies a lack of consent. (*Ford v. Ford*, 143 Mass. 577; *Lee v. Lee*, 8 Allen, 419.) The period of desertion begins when the intent to desert is formed. (Civ. Code, sec. 100; *Pinkard v. Pinkard*, 14 Tex. 356.²) The cir-

¹ 65 Am. St. Rep. 179.

² 65 Am. Dec. 129.

cumstances of the desertion are matters of evidence which should not be averred (*Gray v. Gray*, 15 Ala. 779; 2 Bishop on Marriage and Divorce, sec. 668.) The complaint states a cause of action. (Civ. Code, sec. 95.)

TEMPLE, J.—This is an appeal from a judgment of divorce, without a bill of exceptions. The defendant did not appear, by demurrer or answer, and the only point made on the appeal is, that the complaint does not state a cause of action. Appellant, in substance, contends that the complaint only contains the averments, that on the eighth day of March, 1898, defendant voluntarily separated himself from plaintiff without any fault on the part of plaintiff, with intent to desert her, and did desert, and has continued since, and still does continue, to desert her.

It is said that section 95 of the Civil Code gives no definition of desertion, but the following sections of the code, giving instances of desertion, constitute the real definition. But, while section 95 furnishes a very imperfect explanation in itself, taken in connection with the succeeding sections its meaning is obvious enough, and besides, the word "separation," when used in reference to husband and wife, has a well-established popular meaning. Applying that meaning here, as we must, the section is clear enough. When one is told that certain married persons have separated, he is at no loss for the meaning. And besides, contracts between husband and wife to "separate" and live apart are authorized, and not altogether unknown among us. So construed, the complaint charges that the defendant left plaintiff, intending no longer to perform his duty to her as her husband, but to sever the matrimonial relation so far as he was able, and that he had ever since continued his desertion. It charges him with having abandoned her with a fixed determination not to perform his matrimonial obligations.

This is, under the statute, to state a cause of divorce, and admitting that the facts are quite defectively stated, still the complaint is amply sufficient as against an attack of this character.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 2649. In Bank.—August 31, 1901.]

THE COMMERCIAL AND SAVINGS BANK OF SAN JOSE, Respondent, v. JOHN A. HORNBERGER et al., Appellants.

PLEDGE OF LIFE INSURANCE POLICY—FORECLOSURE BY PLEDGEE—APPEAL BOND—STAY OF EXECUTION—SUPERSEDEAS.—Upon appeal from a judgment in favor of a pledgee of a life insurance policy foreclosing the lien of the pledge, the ordinary bond upon appeal in the sum of three hundred dollars is sufficient to stay execution; and a *supersedeas* will issue to prevent a sale of the policy under the decree, pending the appeal.

ID.—DANGER OF LOSS OF POLICY—NATURE OF SECURITY—KNOWLEDGE OF PLEDGEE.—The danger of the loss of the policy, pending the appeal, by a violation of its terms by the insured, cannot operate to change the statutory rule governing a stay of proceedings upon appeal. Such danger is inherent in the nature of the security, and the pledgee by accepting it, is chargeable with knowledge of its condition.

APPLICATION for *supersedeas* to prevent a sale under execution, pending an appeal from a judgment of the Superior Court of the City and County of San Francisco. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

Joseph Hutchinson, for Appellants.

Jackson Hatch, for Respondent.

HENSHAW, J.—Defendant Hornberger had pledged to the plaintiff bank a policy of life insurance as security for his indebtedness to that corporation. In an action upon that indebtedness the bank recovered judgment. Question having arisen as to the interest of Hornberger's wife in the policy of life insurance, the bank brought its action, seeking to foreclose the lien of its pledge and to sell the policy of insurance. It obtained judgment as prayed for, and from that judgment the defendants have appealed to this court. Their appeal was accompanied by the statutory three-hundred-dollar bond, and they have applied for a writ of *supersedeas* to prevent the threatened sale of the policy.

That the three-hundred-dollar bond stays execution of the judgment in this action is settled in the case of *Owen v. Pomona Land and Water Co.*, 124 Cal. 331. (See also *Snow v. Holmes*, 64 Cal. 232.) The hardship to respondent, pointed out in argument, to the effect that its security may be wholly lost by the insured Hornberger violating the terms of the policy, cannot operate to change this statutory rule. The weakness or insecurity of the pledged property is inherent in its very nature, and the bank, in accepting it, was chargeable with knowledge of its condition.

Let the writ of *supersedeas* issue as prayed for.

McFarland J., Harrison, J., Garoutte, J., Van Dyke, J., and Beatty, C. J., concurred.

[L. A. No. 887. Department One.—September 3, 1901.]

H. E. STORRS Executor etc. Respondent, v. LOS ANGELES TRACTION COMPANY, Appellant.

NEGLIGENCE—PERSONAL INJURIES—ELEMENTS OF COMPENSATION—

DAMAGES—INSTRUCTION.—In an action to recover damages for personal injuries, caused by the negligence of the defendant, it was proper to instruct the jury that the measure of recovery was compensatory damages, the elements of which were expenses paid by plaintiff for care and nursing while disabled, and the value of the time lost while disabled, to be determined from direct evidence before the jury, and such reasonable compensation for impairment of his earning power, and for his pain and anxiety, as the jury might, in their sound discretion, determine, not exceeding, in all, the amount alleged.

ID.—COMPENSATION FOR INABILITY TO ATTEND TO BUSINESS—REFUSAL OF INSTRUCTION.—An instruction requested, to the effect that the jury could not award any damages for loss which the plaintiff might have suffered because of inability to attend to his business after the accident, was properly refused.

ID.—EARNINGS NOT PROVED—EARNING CAPACITY—DISCRETION OF JURY.

—Where the evidence showed that the plaintiff was accustomed to attend to his own business, the general nature of which appeared, and that as the result of the injury his capacity for attending to his business was seriously impaired, the fact that there was no proof of earnings, or of any specific amount that he was capable of

earning, cannot deprive him of the right to compensation for his earning capacity, of which the jury may judge, and, in the exercise of a wise discretion, fix the amount of damages to be recovered therefor; and their verdict thereupon will not be disturbed, if it does not appear to be excessive.

1D.—EVIDENCE—MATTERS OF COMMON KNOWLEDGE.—No testimony is required upon matters which are presumably within the knowledge or observation of all men of common intelligence.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

E. H. Lamme, and E. E. Millikin, for Appellant.

C. C. Wright, for Respondent.

HARRISON, J.—The plaintiff's intestate brought this action to recover damages for personal injuries sustained, through the negligence of the defendant, while being carried as a passenger upon one of its cars in the city of Los Angeles. The cause was tried before a jury, and a verdict rendered in favor of the plaintiff for the sum of two thousand dollars. After the rendition of the verdict and the entry of judgment thereon, the plaintiff died, and his executor was thereupon substituted as plaintiff in the cause, under an order of the superior court. The defendant moved for a new trial, which was denied, and from this order and the judgment defendant has appealed.

The court instructed the jury that they were not at liberty to give punitive damages, but that they could award the plaintiff "only such actual damages as the evidence shows to a reasonable certainty he has sustained by reason of the accident of which he complains." It also gave to the jury the following instruction: "If the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages,—that is, such sum as will compensate him for injury he has sustained. The elements entering into damage are the following: 1. Such sum as will compensate him for the expenses he has paid or incurred in caring for and nursing him during the period that he was disabled by the injury, not exceeding the amount alleged in the complaint. 2. The value of his time during the period that he was disabled by the injury. 3. If the injury has impaired

the plaintiff's power to earn money in the future, such sums as will compensate him for such loss of power. 4. Such reasonable sum as the jury shall award him on account of pain and anxiety he has suffered by reason of his injury. The first two of these elements are the subjects of direct proof, and are to be determined by the jury on the evidence they have before them. The third and fourth elements are from necessity left to the sound discretion of the jury, but the damages, in all, cannot exceed the amount alleged."

The correctness of this instruction is challenged by the appellant, upon the ground that there was no evidence before the jury of the pecuniary value of the time lost by the plaintiff, or from which the jury were authorized to estimate his earning capacity.

It appears by the instruction itself that in determining the value of the time during the period that the plaintiff's intestate was disabled by the injury, the court limited the jury to the evidence which they had before them, and in the absence of any showing to the contrary, it is not to be assumed that this instruction was disregarded. The court properly refused the instruction asked by the defendant, to the effect that they could not award any damages for loss which the plaintiff might have suffered because of inability to attend to his business since the happening of the accident.

The objection of the appellant, that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable. His right to recover does not depend upon the fact that at the time of the injury he was actually employed in the service of another, nor does the amount of his recovery depend upon the amount of wages which he was receiving. The fact that he was not in the receipt of any salary or wages, but was attending to his own business, does not deprive him of right to compensation for the loss of his earning capacity, since it is what he was capable of earning, rather than what he was actually earning, that was to be considered by the jury. It may be conceded that in the absence of all evidence tending in any respect to show an impairment of his earning capacity, the jury would not have been authorized to include any compensation therefor in their verdict, but it does not follow that

it was necessary that there should be direct or specific testimony that he was in the actual receipt of wages, or capable of earning a specific sum in any particular employment. Evidence that he was in the receipt of wages or of a salary would have been admissible as an element upon which the jury could act, but would not have been determinative of the amount of their verdict, inasmuch as it would still be necessary to consider the length of time in which he would probably receive that salary, and the extent to which his capacity for earning it would be impaired, and there could be no direct or specific testimony upon these points. If the circumstances which were before the jury show that by reason of the injury he has become unable to perform the labor or transact the business which he was accustomed to transact or perform prior thereto, he is entitled to recover damages therefor, and from the nature of the investigation the amount of such recovery must be left to the wise discretion of the jury. It needs no evidence to show that a plaintiff in full health and vigor, who has lost an arm or a hand by reason of the negligence of the defendant, has had his earning power greatly impaired, and in such a case a jury would not be limited to nominal damages, although there should be no evidence that he was in the receipt of wages at the time of the injury, but would be authorized to give substantial damages. (*Chicago etc. R. R. Co. v. Warner*, 108 Ill. 538; *Fisher v. Jansen*, 128 Ill. 549; *District of Columbia v. Woodbury*, 136 U. S. 450; *Gainesville etc. Ry. Co. v. Lacy*, 86 Tex. 244; *Missouri etc. Ry. Co. v. Vance* (Tex. Civ. App.), 41 S. W. Rep. 167.) The rule for measuring damages is, however, the same, whatever may be the extent of the injury, but the measure of damages in any particular case will depend upon the facts in that case. No testimony is required upon matters which are presumably within the knowledge or observation of all men of common intelligence. "Juries are in many cases permitted to exercise their own individual judgments as to values, upon subjects presumptively within their own knowledge, which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict." (*Cederberg v. Robison*, 100 Cal. 93.)

In the present case the evidence before the jury showed that the plaintiff was seventy-five years of age, and up to the time of the injury had been active and in good health, and

engaged in attending to business of his own, which, from the testimony of others, appears to have been somewhat extensive and diversified. He had held positions of trust in several financial and other corporations, and although it does not appear that he was holding these positions at the time he received the injury, this fact affects merely the weight to be given to the evidence. The evidence itself was competent to be considered by the jury in determining the extent of his earning capacity. There was also evidence that, as a result of the injury, he had become afflicted with heart disease, by which his capacity for attending to his business was seriously impaired. The plaintiff himself was also a witness at the trial, and the jury thus had an opportunity to judge of his ability at that time. This, in connection with the testimony of his circumstances and condition in life prior to receiving the injury, his capacity, and occupation, was evidence from which the jury could estimate his earning power, and the extent of his damage in that particular. Upon these points the jury were at liberty to exercise their own judgment, without the necessity of introducing any specific testimony thereon from witnesses, and unless their verdict should appear to be excessive, it should not be disturbed. If the damage claimed were of an extraordinary character,—as, for example, an inability to pursue his calling as a physician, or in any other professional capacity,—the rule might be different, but there is no claim of that character here, and the amount of the verdict does not appear to be excessive.

The other instructions objected to by the appellant need no particular comment. They are in accordance with established principles of law. Neither did the court err in excluding the evidence sought to be introduced by the appellant. The defendant could not relieve itself of the consequences of its own negligence by showing that others were equally negligent.

The judgment and order are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[Sac. No. 857. Department Two.—September 3, 1901.]

In the Matter of the Estate of CHARLES GALLAGHER,
Deceased. MARY GALLAGHER, Appellant. AN-
THONY GALLAGHER, Respondent.

ESTATES OF DECEASED PERSONS—PROBATE HOMESTEAD—FARMING-LAND WITHOUT DWELLING.—Farming-land upon which there is no dwelling, and which had not been lawfully claimed as a homestead, and was not lived upon at the time of the husband's death, cannot be set apart to the widow as a probate homestead, by the superior court, under section 1465 of the Code of Civil Procedure.

ID.—BURNED DWELLING NOT REBUILT—INVALID CLAIM OF HOMESTEAD—OFFER OF WIDOW TO REBUILD.—Though the spouses formerly lived for many years upon the farming-land in question, in a dwelling-house thereupon, which was destroyed by fire several years prior to the husband's death, and never rebuilt; and though the wife, while they were living upon the land, filed an invalid claim of homestead thereupon, which she believed to be valid; and though, as widow, when applying for the homestead, she offered to rebuild the burned dwelling,—none of these facts can affect the legal question involved, or justify the superior court in setting apart to the widow, as a probate homestead, the bare farming-land, which was neither occupied as a home, nor suitable to be a home, at the time of the husband's death.

ID.—NATURE OF HOMESTEAD RIGHT—STATUTE LAW—JUSTICE NOT CONSIDERED.—A homestead right is a creation of modern statute law, and can only be acquired in substantial compliance therewith. The question whether it would be just to set apart a probate homestead, which the law does not permit, cannot be considered.

APPEAL from an order of the Superior Court of Sutter County denying an application to set apart a probate homestead to the widow of a deceased person. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

W. H. Carlin, for Appellant.

K. S. Mahon, and Lawrence Schillig, for Respondent.

McFARLAND, J.—This is an appeal by Mary Gallagher, widow of the deceased, from an order denying her application to have set apart to her as a homestead certain land of the estate.

The application was made under that part of section 1465

of the Code of Civil Procedure which authorizes a probate court to set aside a homestead when "none has been selected, designated, and recorded" during the lifetime of the spouses. There is no dispute about the facts. The land sought to be set aside is farming-land, upon which there was no dwelling-house, and no building that could be used as a dwelling; and at the time of the husband's death neither he nor the petitioner was living on the land. There had been no statutory homestead. The contention of respondent is, that the property involved was not of the nature and character of homestead property, and therefore could not be set apart as a homestead, under section 1465.

In the opinions in some of the cases cited by respondent—as, for instance, *Kingsley v. Kingsley*, 39 Cal. 665 (which, by the way, did not deal with the code provisions concerning homesteads); *In re Carriger*, 107 Cal. 618; *Wickersham v. Comerford*, 96 Cal. 433; *In re Armstrong*, 80 Cal. 71—there was, no doubt, some *dicta* not necessary to the determination of the cases upon the facts presented. And the expression used in some of those cases, to the effect that a probate homestead can be set apart only upon property which could have been dedicated, under the homestead act, immediately preceding the death of the husband, must be construed to mean only that it must be property which in its character is homestead property—that is, a dwelling-house, with the land on which it is situated, and which could have been occupied as a home—and not that it must be land on which the husband actually resided at the time of his death. In the case of a probate homestead, the court creates the homestead, and it may be carved out of any property of the estate suitable for a homestead. In the case of *In re Bowman*, 69 Cal. 244, the court say: "The statute regulating the matter does not require that they [the premises] should ever have constituted the residence. The finding of the court is, that the property set apart is suitable and proper for a homestead, and that was a sufficient basis for the order setting it apart." (See also *Estate of Busse*, 35 Cal. 310, and *In re Noah*, 73 Cal. 590.¹) In the latter case it is said: "It may be conceded that the real property set apart as a homestead to the surviving husband or wife, by order of the court, need not be actually occupied at the time when the order is made." There is no doubt that where there are two or more pieces

¹ 2 Am. St. Rep. 834.

of land belonging to an estate, each having a dwelling-house on it, and being suitable for a home, the probate court may set apart either piece as a homestead for the widow, if there are no other valid objections to such action.

But we think that the authorities cited by respondent establish the rule that a probate homestead cannot be carved out of a tract of naked agricultural land, having on it no dwelling-house or other qualities of a home, and therefore we are of the opinion that the order appealed from must be affirmed.

It appears that for many years prior to the month of October, 1896, the deceased and petitioner resided on the lands here involved, in a dwelling-house which stood thereon; that in said month the dwelling-house and its contents were destroyed by fire; and that from that time until the death of the husband, which was in February, 1899, between two and three years afterwards, neither husband nor wife resided on the land, but lived elsewhere, and that petitioner continued to live elsewhere until the date of the filing of the petition. No other dwelling-house was ever built on the land, nor was it in any way occupied as a home. These facts do not affect the legal question presented. It is not necessary to inquire what petitioner's rights would have been if, after the burning of the house, the parties had continued to live on the land, in a tent or under the trees, or even if, while erecting another house, they had temporarily lived off the land, and the husband had died while these conditions existed. Where parties actually live on a piece of land and make it their *bona fide* home, the phrase "dwelling-house," as used in the homestead law, would undoubtedly be given a very liberal construction. But in the case at bar there is no pretense that the parties lived on the land, or in any way made it their home, after the burning of the house.

The court did not err in rejecting the offer of petitioner to prove that in 1875 she executed and had recorded a paper which she supposed was a good declaration of homestead on the land in question, but which was ineffective because not in compliance with the law, and that down to about May, 1890, she believed such paper to be a valid and effective homestead declaration. Neither did the court err in rejecting her offer to prove that it was her intention, if the court should grant her application, to move upon the land and

erect a suitable dwelling-house or home. If these facts had been proven, the legal aspect of the question involved would not have been changed.

We cannot deal with the question whether or not it would be a just thing to give the land to petitioner. A homestead right is a creation of modern written law; and it can be acquired only by, at least, a substantial compliance with that law.

The order appealed from is affirmed.

Henshaw, J., concurred.

TEMPLE, J., concurring.—I concur in the judgment, and for the reasons stated. The discussion of former cases seems to have no bearing upon this case.

[Sac. No. 807. Department One.—September 6, 1901.]

I. W. HEILIG, Appellant, v. W. W. PARLIN, Respondent.

VENDOR AND PURCHASER—CONTRACT OF SALE—RESCISSION BY VENDOR—RECOVERY OF PAYMENTS BY PURCHASER.—Where a contract of sale of real estate is rescinded by the vendor for non-payment of further installments of the purchase-money, by retaking possession of the land, with notice to the purchaser that the contract is absolutely abandoned and determined, the purchaser may recover back the installments of purchase-money which have been paid under the contract so rescinded.

ID.—FORMER JUDGMENT—ACTION TO QUIET TITLE—CROSS-COMPLAINT FOR PURCHASE-MONEY—RES ADJUDICATA.—A former judgment in an action to quiet title, brought by the vendor against the purchaser after the vendor had retaken possession, in which the purchaser pleaded the contract of sale, and alleged performance thereof to the date of ouster, and filed a cross-complaint, praying judgment for a return of the purchase-money paid, but did not allege a rescission of the contract of sale, is not *res adjudicata*, in bar of a subsequent action to recover the purchase-money paid, in which a rescission of the contract of sale is alleged and admitted.

APPEAL from a judgment of the Superior Court of Kings County and from an order denying a new trial. M. L. Short, Judge.

The facts are stated in the opinion of the court.

James A. Burns, and Dixon L. Phillips, for Appellant.

A. G. Park, R. J. Hudson, and Hudson & Prior, for Respondent.

VAN DYKE, J.—January 2, 1891, the appellant, Heilig, and respondent, Parlin, entered into an agreement, in writing, for the sale, by Parlin to Heilig, of a certain twenty acres of land in Kings County, then belonging to Parlin. Heilig was required by the agreement to take possession of the land and to make certain payments, and at his own expense set out to vines or fruit trees one fourth of said land each year for four successive years, and keep the same in good growing and thrifty condition. Thereupon the vendee, Heilig, entered into possession of said land and performed the conditions and paid all the portion of the purchase price required up to February 2, 1895, amounting to \$885.45, and the costs of the improvements, amounting to \$1,455. The payment due February 2, 1895, not having been paid, eight days thereafter—to wit, on the 10th—Parlin, the vendor, served a notice, in writing, demanding possession of the land, and notified the vendee that the contract was absolutely abandoned and determined because of the failure to make said payment, and soon thereafter he took possession of said land, and on March 19, 1895, commenced an action in the superior court of Kings County to quiet title to said twenty acres of land. Heilig, as defendant in said action, answered, and also filed a cross-complaint, setting out, in substance, the contract referred to, and alleging due performance up to the date of the ouster, and praying judgment on the cross-complaint for the amount of the purchase-money paid and money expended under the contract. Parlin, the plaintiff in that action, filed a general demurrer to the answer and also to the cross-complaint, which demurrers were sustained by the court, and Heilig, the defendant therein, declining to amend, his default was taken, and judgment entered in favor of Parlin, plaintiff therein, quieting his title to said tract of land. Thereafter, in December, 1896, this action was brought to recover the portion of the purchase price paid on the land and the money expended, on the ground, as alleged in the complaint, that the contract was rescinded on the part of the vendor, the defendant herein. On the trial of this case, after the plaintiff had rested,

the defendant offered, and the court admitted in evidence, against the objection of the plaintiff, the judgment roll in the former action, rendered January 18, 1896, in which the defendant herein was plaintiff and plaintiff herein was defendant, that being the action to quiet title to the twenty acres of land in question. At the request of the defendant, the court also instructed the jury that said judgment "is a former adjudication of the action now before you, and is a bar to the plaintiff's recovery in the present action, and you are instructed to return a verdict for the defendant."

The question presented on this appeal is, whether the judgment in the action to quiet title is a bar to the recovery in this action, which is in the nature of an action for money had and received, paid out, and expended. The effect of a judgment in an action is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest litigating for the same thing, under the same title, and in the same capacity. (Code Civ. Proc., sec. 1908.) "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." (Code Civ. Proc., sec. 1911.) The matter directly involved in the former suit was the title to the tract of land in question, which was sought to be quieted. The matter directly involved in this action is the right to recover money paid on a contract rescinded by the other party to it. The only thing appearing upon the face of the judgment to have been adjudged in the former action is the title of Parlin, the plaintiff therein, to the land in question, and his right to have such title quieted, and that judgment was entered upon the default of the defendant, the plaintiff here, which was an equivalent to a disclaimer on his part to any claim or title to said land. In other words, he acquiesced in the rescission of the contract on the part of Parlin, and falls back upon his right resulting from such rescission to recover the money paid, laid out, and expended while the contract subsisted.

The cross-complaint in the action to quiet title did not aver that the contract, in reference to which the money had been paid and expended, had been rescinded. It may have been for that reason that the court sustained the demurrer on the ground that it failed to state a cause of action. In the present case, however, the complaint directly alleges a rescission on

the part of the vendor, Parlin, and this allegation is not denied in the answer. In such case the vendee is clearly entitled to recover what he paid under and in pursuance of the contract so rescinded. (*Bohall v. Diller*, 41 Cal. 533; *Shively v. Semi-Tropic L. & W. Co.*, 99 Cal. 259; *Merrill v. Merrill*, 103 Cal. 287; *Glock v. Howard and Wilson Colony Co.*, 123 Cal. 15.¹) We think the court below erred in holding and instructing the jury that the judgment in the action to quiet title was a bar to the plaintiff's recovery in the present action.

Judgment and order denying a new trial are reversed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 2544. Department One.—September 6, 1901.]

JOSEPH BRANDENSTEIN, Appellant, v. R. B. JOHNSON et al., Respondents.

APPEAL—MOTION TO DISMISS—SERVICE OF NOTICE BY MAIL—SUFFICIENCY OF PROOF.—Upon motion to dismiss an appeal for failure to serve the notice of appeal upon all of the adverse parties, where appellant submitted an affidavit, stating in positive terms service of the notice upon their attorney by mail, and the existence of the conditions upon which such service was permissible, and also stating that, after the service, respondent's attorney admitted receipt of the notice through the mail, such statements will prevail over any mere inference to the contrary, from facts set forth in an affidavit of respondents' attorney, including a statement of mere want of recollection by him of the admission that the notice was received.

MOTION to dismiss an appeal from a judgment of the Superior Court of Fresno County. E. W. Risley, Judge.

The facts are stated in the opinion of the court.

George E. Church, Henry U. Brandenstein, and Percy Clarke Church, for Appellant.

George L. Warlow, and Horace Hawes, for Respondents.

THE COURT.—Upon the respondents' motion to dismiss the appeal upon the ground that service had not been made

upon all of the adverse parties, affidavits were presented, from which it appears that the notice of appeal was served by mail. The affidavit in support thereof states in positive terms the fact of such service, and the existence of the conditions under which such service may be made, one of which is, that the attorney making the affidavit did not know the residence of the attorney for the respondents. It also states that, after such service, the attorney for the respondents admitted that he had received the notice so sent him through the mail. In reply thereto, said attorney has filed an affidavit, setting forth certain facts from which it might be inferred that the attorney for the appellant did in fact know the place of his residence, and also denying, "according to his best recollection, upon the subject," that he had admitted having received the notice. We must hold, however, that as these facts are positively stated in the affidavit on behalf of the appellant, they must prevail over any inference to the contrary that may be drawn from the facts set forth in the affidavit on behalf of the respondents, and against the want of recollection thereof on the part of said attorney.

The motion is denied.

[L. A. No. 817. Department Two.—September 6, 1901.]

CARLETON W. MILLER, Respondent, v. E. A. FANO et al., Appellants.

FALSE IMPRISONMENT—MISTAKEN IDENTITY—IDENTIFYING PERSON NOT LIABLE.—One who, without malice, but acting under an honest mistake as to the identity of a party, erroneously identifies such person to an arresting officer, who thereupon takes him into custody, is not liable for the false imprisonment, if he in no other manner either aided or assisted in the wrongful arrest, or directed, requested, or advised the officer to make it.

ID.—LIABILITY OF ARRESTING OFFICER—CARELESS ARREST OF INNOCENT PERSON.—A police-officer who makes an arrest must use prudence and diligence to find out if the party arrested is the party described in his warrant, and if he willfully or carelessly arrests an innocent party, he is liable for false imprisonment.

ID.—EVIDENCE—CIRCUMSTANCES OF UNLAWFUL IMPRISONMENT.—In an action for such false imprisonment, all the facts and circumstances

connected with his unlawful imprisonment, including his treatment while in the custody of other police officials, to whom he had been surrendered, are admissible in evidence.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Frederick W. Stearns, for Appellants.

McNealy & Andrews, for Respondent.

THE COURT.—This action was brought to recover damages for false imprisonment. The court filed findings, and ordered judgment for plaintiff for the sum of fifteen hundred dollars. The defendants appeal from the judgment and from an order denying their motion for a new trial. It is claimed—and we think correctly—that the evidence is insufficient to sustain the findings, in so far as they find that defendant Fano arrested or imprisoned the plaintiff. There is no evidence to show that defendant Fano advised or participated in the arrest or imprisonment of plaintiff.

False imprisonment is the unlawful arrest or detention of a person without warrant, or by an illegal warrant, or a warrant illegally executed, and either in a prison or place used temporarily for that purpose, or by force and constraint without confinement. It is not claimed that Fano was an officer, or that he made the arrest personally, or that he personally imprisoned the plaintiff or deprived him of his liberty. It is, however, claimed that by his acts and conduct he assisted defendant Place in the unlawful arrest and imprisonment. If a party authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest without process, or participates in the unlawful arrest or imprisonment, such party is liable. With these definitions in view, the facts as to defendant Fano may be briefly stated as follows: He resided in the city of San Diego in the year 1898, and was manager for the firm of "S. H. Moll & Co.," engaged in the business of buying and selling railroad tickets. After buying such tickets—particularly to Eastern points—he was in the habit of dealing with one Lehman, of Los Angeles, to whom he would resell the tickets. He bought three tickets

at one time, and sent them to Lehman. After sending, them he received from Lehman the following letter:—

“LOS ANGELES, CAL., August 13, 1898.

“MR. E. A. FANO, San Diego, Cal.

“*Dear Sir*,—I just received your letter inclosing the two Phoenix tickets, and one for Jerome Junction, Arizona. The ticket reading to Jerome belongs to me, as you will see by the inclosed receipt. What did you pay for this ticket? When did you buy it? Give me a description of the man that sold it to you. I have sworn out a warrant for his arrest. See if you can locate him. Be sure and send back this receipt in your next letter, as I must have it in evidence. Let me hear from you by return mail. Will send draft when I get an answer to this.

Yours very truly,

“C. J. LEHMAN.”

About the 20th of August, defendant Place received a telegram from one Johnston, a constable of Los Angeles, in substance as follows: “Arrest Frank L. Kuhn. See Fano, a broker, number 735 Fifth Street, for information.” After the receipt of the above telegram, Place went to see defendant Fano and showed him the telegram. Fano told Place that a party had been in his place of business and sold him the ticket, and when asked for a description of the party, Fano said that he was not good at giving descriptions, but that he thought he would know the party if he should see him on the street. Some days afterwards, and about the seventh day of September, 1898, Place met Fano in front of the Express Block, on F street, and Fano told him that he thought the party was over in Hirschler’s store. After Fano went across the street to Hirschler’s store, he came back, and, the defendant Place testified, “he identified Mr. Miller to me, as I understood it, as the man I wanted to arrest.” Place further testified that after he arrested plaintiff he took him to Fano’s store, and Fano said, “That is the man,” or “That is the man I sold a ticket to.” “I asked Mr. Fano, I says, ‘Mr. Fano, is this the man that I want?’ and Mr. Fano said something about the party that had been in there and sold him a ticket, or the ticket, or something. I know the ticket proposition came in at that time, and he turned around and asked the boy in the store, and the boy says ‘yes.’ He turned to the boy, and asked the boy, and says, ‘This is him, isn’t it?’ or ‘This is the man?’ or something of that kind, and the boy said ‘yes.’

That was all Mr. Fano had to do with it. . . . I arrested him upon the strength of the telegram I had from Los Angeles; that is what I went on as my authority for making the arrest."

The witness Price—the boy referred to as being in Fano's store—testified: "Mr. Place brought the man in, and he says, 'Is this the man?' Mr. Fano says, 'He looks like a man who sold us a railroad ticket.' Mr. Fano asked me what I thought of it, and I told him 'yes;' I thought the same as he."

Defendant Fano testified, that after Place came to him and showed him the telegram, that he saw plaintiff, and believed him to be the man who sold him the railroad ticket; but he testified: "I never identified Mr. Miller as Mr. Kuhn. No, sir; there was no name mentioned of anybody in all the dealings of the whole thing; there was no name at all mentioned. I said, 'There is the man that sold me a railroad ticket'; that was the only answer."

The plaintiff testified as to being taken by Place to Fano's store, and "Mr. Fano was sitting there, and Mr. Place said, 'Is this the man that sold you that ticket?' Mr. Fano said, 'Yes; that is the man'; . . . 'you are the man'; and he turned and said to his clerk, 'Ain't he?' and the clerk kind of grinned, and said, 'I guess you are right.' I says, 'You are mistaken.'"

The above is all the evidence in any way tending to connect Fano with the transaction. It does not appear that he had any malice toward plaintiff, or that he even desired his arrest. He never counseled it in any way or manner. It does not appear that he knew Kuhn, the man named in the telegram. He certainly believed plaintiff to be a man who had sold him a railroad ticket. He told plaintiff so, and asked his clerk if plaintiff was not the man, in the presence of plaintiff. The clerk also thought so. As to whether the identification was sufficient to justify Place in arresting plaintiff, seems not to have concerned Fano. The identification might have been one of the causes, or the principal cause, of the arrest, but it does not follow that Fano aided or abetted in the wrongful act of Place. If Fano had known nothing at all about any intention on the part of Place to arrest plaintiff, and had identified him precisely as he did, such identification might have caused the arrest, but surely it could not be contended that, under such circumstances, Fano would be guilty of false imprisonment. It is the duty of every citizen, when called upon, to give all in-

formation in his possession to the proper officers of the law as to persons connected with crimes. No doubt, if a person should willfully identify the wrong man as being the criminal, for the purpose of having him arrested and prosecuted, and on such identification he should be arrested, such person would aid and assist in the arrest. But it would be a hard and unjust law that would hold a party responsible in damages for false imprisonment for an honest mistake as to the identity of a party.

It is said by Newell, in his work on Malicious Prosecution (sec. 8, p. 108), "It is only where the party himself orders or encourages lawlessness that he can be treated as a joint wrong-doer, because he is actually a trespasser, and is liable to the extent of his own misconduct."

In the case of *Hopkins v. Crowe*, 7 Car. & P. 373, it was said by Lord Denman: "If the defendant directed the police-officer to take the plaintiff into custody, he is liable in the present action for false imprisonment; but if he merely made his statement to the constable, leaving it with the constable to act or not, as he thought proper—that is, if the defendant, in effect, said, 'You may take him if you think proper'—then the defendant will not be liable, at least not in this form of action. Police-officers are quite wrong to take a person into custody, merely because another says, 'He has cruelly used my horse.' They should either inquire into all the particulars, or else they should see the animal, so as to form a judgment as to what has occurred."

So where a joint defendant appeared to have disclosed to the officer what he knew, and expressed an opinion that there was enough of suspicion against the defendant to have her examined, he was held not liable. (*Burns v. Erben*, 26 How. Pr. 276; 40 N. Y. 466.) In the opinion this language is used: "He did not request or urge any arrest, but left it to the officer at the station-house to decide on its propriety. Nor did he make any charge. Such officer appeared to exercise the authority given him by law of arresting persons that he suspected."

In a late case (*Joske v. Irvine*, 91 Tex. 574), the supreme court of Texas appears to have carefully considered the question. A merchant had requested a policeman to trace his goods, for which his delivery-man had failed to account, and had threatened to make an affidavit against the delivery-

man. The policeman, immediately after the talk with the merchant, arrested the delivery-man without warrant. It was held that the merchant was not liable for false imprisonment. In speaking of what Joske, the merchant, had done and said, the court used this language: "We are of the opinion that from the mere exercise of this right the law will not permit the inference to be drawn that he 'requested or directed' the arrest, though it be conceded that but for its exercise the arrest would never have been made." To the same effect are *Veneman v. Jones*, 118 Ind. 45;¹ *Linnen v. Banfield*, 114 Mich. 93; *Murphy v. Walters*, 34 Mich. 180; *Teal v. Fissel*, 28 Fed. Rep. 351.

The court, in finding 7, finds that at the time of the arrest "the defendant Fano and his clerk fully identified plaintiff as Frank L. Kuhn." This finding is not only without support in the evidence, but is contrary thereto. Fano says that he never identified plaintiff as Frank L. Kuhn. It does not appear that Fano ever knew any one by the name of Frank L. Kuhn. Counsel contends that that part of finding 11 to the effect that the arrest of plaintiff and his subsequent imprisonment was willfully done by defendant is without support in the evidence. This contention is true, from what has been said, as to defendant Fano, but there is evidence to sustain the finding as to defendant Place. He was an officer of the law. He made the arrest without legal warrant. When plaintiff was arrested he promptly gave Place his true name and his business card, told him how he came to San Diego, the hotel at which he registered, and the date. He also told him that he had long been in the service of the revenue department at San Francisco, and that Ned Taylor, who lived in San Diego, had known him for over thirty years. Place had known Taylor for several years, but did not take the trouble to look him up, so as to see whether or not he was arresting an innocent man. Plaintiff also told Place of a carpenter by the name of Brewer who knew him, but no attempt was made to find Brewer. Place, without seeking further information as to plaintiff—in fact, ignoring the statements of plaintiff—telegraphed to Los Angeles that "he had secured the man he was seeking." He then took plaintiff to the county jail and delivered him over to the jailer, where he was searched, deprived of his watch and his money. After staying in the county jail all night, the defendant

¹ 10 Am. St. Rep. 100.

Place, on the next morning, delivered plaintiff to the deputy constable from Los Angeles, to which place plaintiff was taken. And this, notwithstanding the fact that Taylor had seen Place and said to him: "Harry, you have made a mistake here; this is my old friend Carleton Miller. I have known him over thirty years." This evidence shows such gross carelessness and disregard of plaintiff's rights that it fully justified the finding as to Place. An officer of the law has a duty to perform in making an arrest. He also owes a duty to the public, and to the party about to be arrested. He should use prudence and diligence to find out if the party arrested is the party described in his warrant. If, in his zeal, he willfully or carelessly arrests an innocent party, he should be made to suffer the consequences.

Testimony was admitted, under the objections of defendants, as to the imprisonment of plaintiff in Los Angeles, and his treatment in jail at that place; that he was confined with persons charged with crime, and compelled to sleep in a bed without adequate clothing. We think the testimony was proper. It was the probable consequence of the unlawful arrest by Place. He placed plaintiff in the custody of the Los Angeles officials as being the party named in the telegram; and all the facts and circumstances connected with his unlawful imprisonment were admissible in evidence. (3 Sutherland on Damages, 2d ed., sec. 1257; *Abrahams v. Cooper*, 81 Pa. St. 232; *Fenelon v. Butts*, 53 Wis. 349; *Kindred v. Stitt*, 51 Ill. 408; *McCall v. McDowell*, 1 Abb. 214.)

Certain rulings are complained of in regard to questions asked of the defendant Place. It is claimed that the evidence was not competent as to defendant Fano. From what has been said as to the evidence, it becomes unnecessary to pass upon the questions. The same may be said in regard to the motions to strike out certain evidence. We find no error in the admission of evidence as to defendant Place that would justify a reversal of the case as to him.

The judgment and order are reversed as to defendant Fano and affirmed as to defendant Place.

[Crim. No. 779. In Bank.—September 6, 1901.]

Ex parte WILLIAM McCLAIN, on Habeas Corpus.

MUNICIPAL CORPORATIONS—POSSESSION OF LOTTERY TICKETS—CONSTITUTIONAL LAW.—Under section 11 of article XI of the state constitution, a municipal corporation, in the exercise of its police powers, has authority, by ordinance, to make it unlawful for any person to have in his possession a lottery ticket, and to punish its violation. Such an ordinance is neither unreasonable nor oppressive.

HABEAS CORPUS from the Supreme Court to the Sheriff of the City and County of San Francisco to test the validity of a municipal ordinance under which petitioner was convicted in the Police Court. Charles T. Conlan, Judge.

The facts are stated in the opinion of the court.

N. S. Wirt, for Petitioner.

A. S. Newburgh, *amicus curiae*, also for Petitioner.

Charles L. Weller, Assistant District Attorney, for Respondent.

HENSHAW, J.—By ordinance No. 68 of the city and county of San Francisco it is made "unlawful for any person to have in his possession any lottery ticket," etc., and upon conviction of a violation of the terms of the ordinance the defendant may be punished by fine or imprisonment, or both. The petitioner here was convicted of a violation of this ordinance, and seeks his release under this writ, upon the asserted ground that the ordinance in question is unreasonable and void.

The United States government refuses the use of its mails to advertising lotteries, transmission of lottery tickets, the announcement of the winning numbers in lotteries—in short, to the sending of any literature in aid of such gambling schemes—and it makes penal the violation of its laws in any of these respects. The state of California, by its penal laws, prohibits the setting up of a lottery, and declares it to be a misdemeanor for any person to sell a lottery ticket. There are, then, against all gambling devices of this kind, not only the public policy of the general government and of this state, but also the express mandate of their criminal laws, so that the avowed policy and the expressed intent is

to stamp out, by penal legislation, the traffic in lottery tickets. It is true that the state, while declaring it to be a penal offense to sell a lottery ticket, has not made the purchaser equally culpable. But no one will question the right of the state to declare, if it sees fit so to do, that the purchaser of a lottery ticket, equally with the seller, is guilty of a misdemeanor. It may be concluded, therefore, that in a reasonable exercise of its police powers a municipality may pass any ordinance in furtherance of the avowed general policy of the national and state government. In this regard our cities and counties draw their power, not from legislative permission, but from the direct grant of the constitution itself, which, by section 11 of article XI, empowers them to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

The matter of this ordinance being, then, clearly one of police regulation, and the power to pass such ordinances being expressly conferred upon a municipality, there is left for consideration the question whether the exercise of that power in this instance be unreasonable or oppressive for the accomplishment of the end in view. Against its validity it is urged that it is unreasonable, in making the mere possession, without reference to any ultimate intent of the possessor, an offense, and, as is usual when a law is attacked upon this ground, harrowing instances are cited—as of a blind man to whom might be given a lottery ticket, he not knowing it to be such, or of another into whose pocket might be thrust the damnatory paper without knowledge upon his part that it was in his possession, and even—so run the argument and citations—the peace-officer who arrests a violator of the law, and takes into his own custody the criminatory evidence, is, under the terms of this ordinance, equally guilty. But the answer to all this is the answer that has been made by every court as often as the argument has been pressed to consideration. The matter is discussed in *Ex parte Lorenzen*, 128 Cal. 431,¹ wherein is quoted the language of Mr. Justice Field in *United States v. Kirby*, 7 Wall. 482, which may well be repeated here: "General terms should be so limited in their application as not to lead to injustice or oppression, or an absurd consequence. It will always be presumed that the legislature intended exceptions

¹ 79 Am. St. Rep. 47.

to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." This kind of legislation is not new to jurisprudence, nor novel upon the statute-books of this state; yet it has never been found necessary to overthrow a law, otherwise valid, because in some supposititious case a person might be charged with its violation, who came within the letter, yet not within the spirit, of the enactment. An ordinance of this city and county, for example, prohibits the carrying of a concealed weapon. It is the mere carrying, under the letter of the law, which constitutes the offense, not a carrying with intent to commit some act of violence. Yet this court has found no difficulty in upholding the law. (*Ex parte Cheney*, 90 Cal. 617.) The citizen who bought a pistol or knife at a gun-store, caused it to be wrapped in a parcel, and proceeded to carry it to his home, might be said, under the letter of the law, to have committed a violation of it. Yet he has not violated the spirit of the law, and the law would hold him guiltless. The statute-books of this and other states abound in provisions for the protection of fish and game, and amongst them is commonly found a law making it penal for one, within certain designated months, "to have in his possession" fish or game of prescribed kinds. In such laws it is not the *purpose* of the possession, but the *fact* of possession, which *prima facie* establishes the offense. And so, while, in their construction of the game laws, courts have differed as to their scope—some holding that the defendant was exculpated if he showed that the game in his possession was killed without the boundaries of the state, others holding that it applied equally to game so destroyed—in all cases there has been an agreement by the courts that the fact of possession *prima facie* evidenced a violation of the act. (*Phelps v. Racey*, 60 N. Y. 10;¹ *State v. McGuire*, 24 Or. 370; *Commonwealth v. Wilkinson*, 138 Pa. St. 304; *Ex parte Maier*, 103 Cal. 476;² *State v. Judy*, 7 Mo. App. 524; *Bellows v. Elmendorf*, 7 Lans. 462; *People v. Fishbough*, 134 N. Y. 393.)

The design of the ordinance is to stamp out lotteries and the traffic in lottery tickets. For if there were no buyers of lottery tickets there would be no sellers of them, and while, as has been said above, by the state law only the seller

¹ 19 Am. Rep. 140.

² 42 Am. St. Rep. 129, and note.

is made culpable, it is clearly within the power and province of the municipality, in its endeavor to eradicate the evil, to hold the purchaser or possessor also culpable.

In the case of *People v. Wong Hane*, 108 Cal. 680, the attention of the court was directed more particularly to the requirements of the ordinance which seemed to exact from the defendant proof of his innocence. If a variance shall be thought to exist between the views there expressed and those here announced, it need but be said that we are satisfied that the foregoing enunciates a sound principle of statutory construction.

For the reasons above given the writ is discharged and the prisoner remanded.

McFarland, J., and Beatty, C. J., concurred.

GAROUTTE, J., concurring.—I concur in the judgment, but deem the language of Justice Field, cited in the main opinion, entirely too general to serve as authority in support of the conclusion here declared. Neither am I at all disposed to agree to the reasoning contained in the opinion of the court promulgated in *Ex parte Lorenzen*, 128 Cal. 431.¹ At the same time, I see no reason why the law-making power may not declare that the possession of a lottery ticket by a person shall constitute a misdemeanor. The statute clearly means a possession *knowingly*, and so construed, there is no legal objection to its validity. (*Ford v. State*, 85 Md. 465;² *Ex parte Mon Luck*, 29 Or. 221.)

¹ 79 Am. St. Rep. 47.

² 60 Am. St. Rep. 337.

[Sac. No. 940. Department One.—September 7, 1901.]

**In the Matter of the Estate and Guardianship of ADELIA
CEAS, a Minor.**

GUARDIAN AND WARD—MISAPPROPRIATION BY FATHER.—A father, who is the guardian of the estate of his minor child, who misappropriates it to his own use, is properly charged therewith in his account, and cannot claim credit for expenses paid by him for the maintenance of the child after such misappropriation.

APPEAL from an order of the Superior Court of Sacramento County settling the accounts of a guardian. R. C. Rust, Judge.

The facts are stated in the opinion of the court.

A. L. Shinn, for Appellant.

W. A. Gett, for Respondent.

VAN DYKE, J.—This is an appeal from an order settling the account of the guardian of a minor. George T. Ceas was appointed guardian of the person and estate of his daughter, Adelia, on the 2d of April, 1883. After qualifying as guardian, on the twenty-first day of April, 1883, he filed an inventory and appraisal of the ward's estate, in which it is said the estate consists of a claim against the United States for the sum of \$1,410. He filed no other account until September 14, 1900, after service of a citation compelling him to do so, and long after his daughter, the ward, had reached her majority. In this account he acknowledges the receipt, on May 2, 1883, within a month after his appointment as guardian, of the sum of \$1,400.07. The money so received was the proceeds of a pension claim due the mother of the ward, who had died December 28, 1879, and to which Adelia succeeded. Against this sum he charges the ward with various items, aggregating \$1,800, leaving the ward indebted to the guardian in the sum of \$390.50, according to his account. The court, in settling his account, disallowed, among other items, the one for \$1,280, as claimed to have been paid to Charles H. Martin for the care of the ward. The contest on the appeal is directed to the disallowance of that item, and it is claimed on the part of the appellant that he had a

right to use the funds of the ward to defray her expenses of maintenance and support, inasmuch as he was financially unable to do so. It appears from the evidence in the case that after the death of his wife, and some time in 1880, the appellant placed his daughter in the charge of the family of Mr. Charles H. Martin. He was then residing on a farm near Sacramento City, as was Mr. Martin. Mr. Martin testifies that he had the care and custody of Adelia during her minority. He says: "We took her when she was eighteen months old. She became of age in 1897 or 1898. George T. Ceas paid me for the care and expense of keeping Adelia. He commenced paying me within a month or so after we took her. It is still continuing. He has not paid it all yet, but has promised to pay." He says they had a verbal agreement that Ceas was to pay eight dollars a month for her board and care, and that this agreement was made when he first took the child. He says they had one child,—a boy,—and that they treated this ward the same as his own child; she helped to do the household work, as children usually do; after about four or five years, they moved to Red Bluff, and lived there a number of years, and that he met Mr. Ceas occasionally—not often—thereafter, before the latter moved to Washington, which, it seems, was in 1886 or 1887. He says perhaps for a year or two after they took the child, Ceas was able to pay his debts, but for the balance of the time, until he left California, he never was a solvent man or able to meet his indebtedness, and that he had to borrow money to get out of the state; he never saw the money that Ceas received from the government; before he left the state, Ceas came up to Red Bluff to see Adelia, and that he asked him to pay, and he said he could not; "he owed me money at that time"; that afterwards he received some fifteen notes of fifty dollars each from Ceas, and that nine of them still remain unpaid. There is no pretense that whatever Ceas paid was paid as guardian, or that the notes were executed as guardian. The testimony of Ceas was taken by deposition in Washington, and it is entirely unsatisfactory. He produces no vouchers or receipts, and can make no explanation of how he disposed of the money or what he did with it. He only says that he did not deposit it in any bank or put it out at interest; don't pretend to know when he paid Mr. Martin, or whether what he did pay was before or after he received the money from the government belonging to his

ward. He pretends that he agreed to pay Martin ten dollars per month, whereas Martin testifies that the agreement was eight dollars. He does not claim that the agreement was made on his behalf as guardian, nor that whatever sums he paid were paid as guardian.

It seems that the child had been in Mr. Martin's family some three years before the money in her behalf was drawn, and therefore, if Ceas paid as Mr. Martin says he did, from the time he first took the child, he certainly paid as father of the child, instead of guardian. And if, as stated, he was obliged to borrow money to leave the state in 1887, and could not at that time make further payments to Mr. Martin, he had already squandered or disposed of the money coming to his hands and belonging to his ward. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as it may be necessary, for the comfortable and suitable maintenance and support of his ward, and his family, if there be any. (Civ. Code, secs. 196, 197.) The court below evidently

Here, however, there was an added duty imposed upon appellant. He was not only guardian in law, but was, as well, guardian by nature, being the parent of the ward. In the former case the guardian's duty is merely to invest and preserve the fund and apply its earnings toward the support of the ward, and where that is insufficient, he may apply to the court and obtain an order to apply part of the principal of the ward's estate toward his support; while in the latter instance it is the duty of the parent to support his child. (Civ. Code, secs. 196, 197.) The court below evidently came to the conclusion, and the testimony justifies the same, that the pretended payment by him for the support and maintenance of his child is a mere excuse for his misappropriation of funds, which it was his plain duty to preserve on her behalf. *In re Eschrich*, 85 Cal. 98, is a case in point. There, one Moore was appointed guardian of Albert C. and Charles Eschrich, and, as such, received from the sale of certain lands belonging to them the sum of one thousand dollars,—one half to each. He allowed several years to pass without taking any steps in the matter of the trust, and used this money for his own purposes. On petition of his wards, he was cited to appear and render an account. He filed his account, in which he charged himself with the thousand dollars, and gave himself credit for \$312, alleged

to have been paid for two years' board for Charles, and \$468, alleged to have been paid for three years' board for Albert. These claims were disallowed, and the court charged the guardian with the sum received, and seven per cent interest with annual rests. This court affirmed the judgment. The cases relied upon on behalf of appellant are clearly distinguishable from the one at bar. Under the showing in this case we cannot say that the court below was not justified in disallowing the claim in question.

The order appealed from is affirmed.

Garoutte, J., and Harrison, J., concurred.

[Sac. No. 740. In Bank.—September 7, 1901.]

THOMAS R. SMITH, Respondent, v. E. F. SMITH et al.,
Appellants.

QUIETING TITLE—HOMESTEAD—SALE FOR ALIMONY—DEEDS—APPEAL BY DIVORCED HUSBAND—EVIDENCE.—In an action brought by a divorced husband to quiet his title to a homestead declared upon community property which had been sold by the divorced wife under an execution for alimony, to which action the purchaser at the sale, and the grantees of the interest of the divorced wife in the homestead, were made defendants, although it appears that the divorced husband had appealed from the judgment of divorce, and from the order granting alimony, the judgment, order, execution deed to the purchaser, and deeds from the divorced wife, are admissible in evidence to show contingent rights in the defendants, which are entitled to be protected by the decree quieting the plaintiff's title.

ID.—RULES AS TO JUDGMENT SUSPENDED BY APPEAL—ABATEMENT—CONTINUANCE—USE AS EVIDENCE.—In order to secure the use, as evidence, of a judgment suspended by appeal, it may, in a proper case, be pleaded in abatement, until it becomes final, when it may be pleaded in bar by supplemental answer. A better mode to avoid an unjust conclusion, in general, is to move for a continuance until the suspended judgment can be used as evidence. But, without regard to these remedies, the rule that, pending an appeal, the judgment cannot be used as evidence to establish the right adjudicated, or to show an estoppel by judgment, does not operate to preclude its use as evidence to establish an indirect or contingent right in the defendants sued in an action to quiet title, to which right the decree for the plaintiff must be subject.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

Elliott & Elliott, Theodore Elliott, and J. B. Webster, for Appellants.

J. G. Swinnerton, for Respondent.

TEMPLE, J.—This is an action to quiet title, and the material facts, very generally and briefly stated, are: Mary E. Smith, wife of plaintiff, brought suit for divorce against him. She obtained a decree granting the divorce, and two-thirds of the community property, which consisted of a homestead. She also obtained an order for alimony, to enforce which an execution was issued, and after the decree was entered, was levied upon the interest of plaintiff in what had been, prior to the decree, the homestead. A sale was had under the execution, and defendant Elliott became the purchaser and has obtained a deed from the sheriff. The plaintiff appealed from the decree granting the divorce and from the order granting alimony. Afterwards, Mary E. Smith conveyed her title to the homestead to E. F. and Estella Smith, and then, the appeals being still undisposed of, died. This suit was then commenced by plaintiff to quiet his title to the homestead, and it was brought to trial while the appeals were still pending and undecided.

The trial court refused to receive in evidence the deed from Mary E. Smith to defendants, because the appeal suspended the operation of the judgment, and also entered judgment for plaintiff, wherein he adjudged "that defendants, and each of them, are hereby perpetually enjoined and restrained from hereafter asserting any right, title, or claim against plaintiff to said property, or any part thereof."

The correctness of the ruling excluding the evidence and entering the judgment are the matters presented on this appeal.

The question here involved is not new, but has been much discussed, and the decisions are not in accord. (See Freeman on Judgments, sec. 328.) In this state it has been held that a judgment, pending the appeal, cannot be used as an estoppel, but in many states the opposite is held. Either rule presents difficulties. If the suspended judgment cannot be

used as evidence, then in other suits, in which such rights could not be tried as an original issue, as here, a bar may be obtained which would deprive the party of the fruits of his litigation in the case on appeal. If such judgment can be used, then the party may in other suits, where the suspended judgment would be evidence, obtain judgments which, when the appeal was finally determined, it would appear, he ought not to have. And in either case such other judgments, obtained through the use of, or suffered through not being able to use, the judgment which is on appeal, could not be reversed, for in either case the ruling would be correct.

It is contended that the rule in this state is, that, pending the appeal, the judgment cannot be used as evidence for any purpose whatever. A rule so general and absolute would manifestly be unreasonable, and goes much beyond the decisions. The rule is, simply, that one cannot avail himself of an adjudication establishing a right while the judgment is suspended by an appeal. In *Woodbury v. Bowman*, 13 Cal. 635, it is merely said: "The appeal having suspended the operation of the judgment for all purposes, it was not evidence in the question at issue, even between the parties to it." The attempt was to show an estoppel by the judgment. This was to enforce the suspended judgment. So far as they are used to determine questions of title, judgments are enforceable in no other way. A judgment merely quieting title cannot be enforced by execution. The ruling therefore was, as already said, merely, that a judgment, while suspended by an appeal, cannot be enforced.

The same explanation applies to the other citations. In *Harris v. Barnhart*, 97 Cal. 546, it is said that the true course of a defendant in such a case is, to plead the pending of the former suit in abatement "until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order." It is evident that such a plea would not in every case be available. The plea of another suit pending will be sustained only when the plaintiffs are the same (*Felch v. Beaudry*, 40 Cal. 439), and when the cause of action is the same in each suit,—when, in fact, the same evidence would support the judgment in each case. (*Montgomery v. Harrington*, 58 Cal. 270.)

A much better mode to secure the benefit of the evidence, and to avoid a conclusion which may prove unjust, is to

move for a continuance, as suggested in *Rose v. Superior Court*, 65 Cal. 570, and *Brown v. Campbell*, 100 Cal. 635.¹

In this case the defendants could not have successfully interposed the plea of another action pending, and they did not ask for a continuance. They can only get such relief, therefore, as they could show themselves entitled to while the judgment in the divorce suit was so suspended that it could not be received as evidence that the matters involved in it had been finally adjudicated. I think even then the defendants had rights which could have been, and which ought to have been, preserved for them.

The action is to quiet title. In such case the defendant is required to set up any title or right, in law or equity, which he has, or claims to have, in the premises involved, that the court may determine their value. If, then, such defendant has a contingent or inchoate right, the value of which must be determined in another proceeding, or which depends upon a contingency, the title of plaintiff should be quieted, subject to such claim. If the court cannot, though all the facts are shown, determine the value or validity of such claim, either because the jurisdiction was vested elsewhere, or because the claims were contingent, it should set out the nature of the claims and refuse further to quiet the title as to them. A right which is contingent upon an event not at the time of the trial determinable can be adjudged in no other way. And I think it follows from what has been said, that to allow proof of the judgment in divorce, and of the order granting alimony, and of the appeal for the purpose indicated, in no way conflicts with the line of authorities cited. It in no way tends to enforce the judgment which has been suspended by the appeal.

The question was raised at the trial by objecting to the introduction of the deed from Mary E. Smith to defendants E. F. and Estella Smith, it being objected that the deed was immaterial, because, as had been shown, appeals had been taken and were then pending, both from the order and the judgment. The objection was sustained and exception noted. It follows from the foregoing that the ruling was erroneous.

Judgment and order reversed and new trial ordered.

McFarland, J., Van Dyke, J., Garoutte, J., Harrison, J., Henshaw, J., and Beatty, C. J., concurred.

¹ 38 Am. St. Rep. 314.

[L. A. No. 935. In Bank.—September 7, 1901.]

CITY OF LOS ANGELES, Respondent, v. LOS ANGELES
CITY WATER COMPANY et al., Appellants.

APPEAL—ORDER SETTLING RECEIVER'S ACCOUNT—FINAL JUDGMENT.—

An order settling the accounts of a receiver, and directing the payment of his compensation by one of the parties, although made before there has been a final judgment in the action in which he was appointed, is a final determination of the rights of the parties to the matter then before the court, and an appeal therefrom, as from a final judgment, may be taken within six months after its entry.

MOTION to dismiss appeals from an order of the Superior Court of Los Angeles County settling the accounts of a receiver. John L. Campbell, Judge.

The facts are stated in the opinion of the court.

White & Monroe, John Garber, and J. S. Chapman, for Los Angeles City Water Company, Appellant.

Graves, O'Melveny & Shankland, for Frank A. Gibson, Receiver, Appellant.

W. F. Haas, and Lee & Scott, for City of Los Angeles, Respondent.

HARRISON, J.—After the commencement of the above action, the superior court appointed a receiver to collect, pending the action, the water rates theretofore collected by the defendant water company. This order was annulled by this court, May 5, 1899, upon the application of the water company. (*Los Angeles v. Los Angeles Water Co.*, 124 Cal. 385.) Thereafter, the receiver presented his account to the superior court for settlement, and after a hearing thereon, the following entry was made in the minutes of that court, September 23, 1899: "It is ordered that the objection of the defendant to the payment of receiver's compensation from funds in his hand be sustained; that the applications of Alexander Caldwell, county assessor, and Ben E. Ward, city assessor, for the payment of taxes be granted, and objection thereto denied; that \$500 per month is a reasonable and proper compensation for said receiver, and that the same be

paid by the city of Los Angeles, and that said account be approved and settled at the sum of \$6,901.91, in the hands of the receiver, which he is ordered to pay the defendant."

On the same day, a formal order was prepared and signed by the judge, in which, after reciting the proceedings in reference to the appointment of the receiver and the filing of his account, together with the objections that had been filed thereto, and the hearing of the same, it was by the court ordered and decreed that the account be settled at the amount above stated, and that the receiver pay the said amount to the Los Angeles City Water Company; that the city of Los Angeles pay to the receiver his compensation for services in the amount of \$4,916.65, and that, upon filing proper vouchers therefor, he be discharged and his sureties released. This order was not entered in the minutes of the court, nor does it appear to have been filed, but it was entered in the judgment-book of the court, September 25, 1899. The receiver and the city of Los Angeles have appealed from different portions of this order. The Los Angeles City Water Company now moves to dismiss these appeals, upon the ground that they were not taken in time. The right to have this motion granted depends upon the character of the order, —whether it is of such a nature as requires an appeal therefrom to be taken within sixty days after it was filed or entered in the minutes of the court, or whether it is a final judgment, from which an appeal may be taken within six months after its entry.

The orders of the superior court from which an appeal may be taken to this court are designated in subdivision 2 of section 963 of the Code of Civil Procedure, and the time within which the right of appeal from these orders may be exercised is given in section 939 of the Code of Civil Procedure. Certain orders in matters of probate of which this court has appellate jurisdiction are also enumerated in subdivision 3 of section 939, and the time for an appeal therefrom is given in section 1715 of the Code of Civil Procedure. The order from which the present appeal is taken is not one of the orders before judgment mentioned in subdivision 2 of section 963 of the Code of Civil Procedure, nor is it a special order made after judgment, since, at the time it was made, no judgment had been rendered in the action; nor is it one of the

interlocutory orders or decrees therein named. The right to appeal therefrom does not rest upon any provision in this subdivision of the section.

That any party aggrieved by such order may appeal to this court therefrom is, however, well settled. (*Estate of Welch*, 106 Cal. 427.) In *Grant v. Superior Court*, 106 Cal. 324, this court refused to prohibit the superior court from making an order fixing the compensation of a receiver, giving as a reason therefor that if the court should order it to be paid out of the fund in the receiver's hands, "such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund," and that as an appeal could be taken from such order, a writ of prohibition would not lie. This was a clear declaration that the order was appealable, although the time within which the appeal might be taken was not then before the court. In *Hovey v. McDonald*, 109 U. S. 150, an appeal had been taken from a decree confirming the account of a receiver, and in discussing the right to appeal therefrom that court said that the proceedings in reference to the account were "a side issue in the case, in which the complainants on the one side and the receiver on the other were the real and interested parties. The decree confirming the auditor's report was, as to this matter, a final decree against the complainants, and in favor of the receiver. The receiver, though not a party in the principal suit, was an officer of the court, appointed in the suit, and was a principal party to the particular question raised by the proceedings referred to,"—and refused to dismiss the appeal. It cited in support of its action *Trustees v. Greenough*, 105 U. S. 527, where it was held that although that court could entertain an appeal only from a final decree, yet a decree for the payment to the complainant, out of the trust fund under the control of the court, of the costs and expenses incurred by him for the benefit of the fund, was so far independent of the suit itself as to make the order substantially a final decree for the purposes of an appeal, although there had been no final decree in the suit; saying of the orders: "They are certainly a final determination of the particular matter arising upon the complainants' petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character,

and received a final decision." The rule thus stated meets with our approval, and we hold that as the order appealed from was a final determination of the rights of the parties to the matter then before the court (Code Civ. Proc., sec. 577), an appeal therefrom as from a final judgment could be taken within six months after its entry.

The question here presented differs from that presented in *Rochat v. Gee*, 91 Cal. 355, and in *Illinois Trust etc. Bank v. Pacific Ry. Co.*, 99 Cal. 407, in that the orders appealed from in those cases were for the settlement of a receiver's account, which had been passed by the court while he was in the exercise of his office, and did not finally determine the rights of the appellants therefrom. The order appealed from in *Illinois Trust etc. Bank v. Pacific Ry. Co.*, 99 Cal. 407, merely declared the priority of a lien to the one held by the appellants, and it was held that as this ruling could be reviewed on an appeal from the final decree, the appellants were not aggrieved thereby. In neither of the cases did the order appealed from direct the payment of any money or the performance of any act by or against the appellant, and, as was said in *Grant v. Superior Court*, 103 Cal. 324, "it lacked one essential element of a final judgment."

The motion is denied.

McFarland, J., Temple, J., Garoutte, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

[L. A. No. 898. Department One.—September 10, 1901.]

JOSEPH WINCHESTER, Trustee, Appellant, v. WILLIAM BLACK et al., Defendants. MRS. M. A. HOWARD, Respondent.

JUDGMENT BY DEFAULT—ORDER SETTING ASIDE—DISCRETION—APPEAL.—

The exercise of the discretion of the court in setting aside a judgment by default, for mistake, inadvertence, surprise, or excusable neglect of the defaulting party, under the authority conferred by section 473 of the Code of Civil Procedure, will not be disturbed upon appeal, unless an abuse of such discretion plainly appears. The discretion of the court is best exercised when it tends to do about a judgment upon the merits of the controversy.

ID.—RULE OF COURT—IMPROPER DEFAULT—RULING UPON DEMURRER—ABSENCE OF NOTICE.—Under a rule of court providing for ten days after notice of an order overruling or sustaining a demurrer in which the adverse party may answer or amend, if the court did not refuse leave to the defendant to answer, or impose terms of answering, in the absence of notice of an order dismissing a demurrer which the defendant failed to urge, the default of the defendant was improperly entered.

ID.—RIGHTS OF DEFENDANT UPON DEMURRER—EFFECT OF ORDER DISMISSING DEMURRER.—A defendant who has interposed a demurrer to the complaint has the right to a direct decision of the issue of law thereby presented, whether he fails to urge it or not. The court is not authorized to strike out the demurrer, or to dismiss it for want of prosecution; and an order dismissing the demurrer on that ground has the same effect as an order overruling the demurrer, and is equivalent thereto, as respects the right of the defendant to notice thereof before default.

APPEAL from an order of the Superior Court of San Diego County setting aside a default and judgment entered thereon. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

C. H. Rippey, and Withington & Carter, for Appellant.

Hunsaker & Britt, Luce & Sloane, and Puterbaugh & Puterbaugh, for Respondent.

HARRISON, J.—Appeal from an order setting aside a default and judgment entered thereon.

The default of the respondent, and judgment against her

in behalf of the plaintiff, was entered November 23, 1899, and on December 4, 1899, a notice was given, in her behalf, to the attorneys for the plaintiff, of her intention to move to set the same aside, upon the ground that they had been entered by reason of mistake, inadvertence, surprise, and excusable neglect on the part of herself and her attorney. This motion was granted by the court, and the plaintiff has appealed.

It appeared from the affidavits and other evidence presented to the court at the hearing of the motion that a demurrer to the complaint was filed on behalf of the respondent herein in June, 1896, and placed upon the motion calendar in department 2 of the court, and that the hearing of the same was by consent of the parties continued from week to week for several weeks. A case involving questions similar to those presented by the complaint herein was then pending in this court, and it was the desire of all the parties that the hearing upon the demurrer should be continued until after the decision in that case. Accordingly, in March, 1897, the demurrer was stricken from the calendar. In September, 1897, the cause was transferred from department 2 to department 1 of the superior court, without any notice to or knowledge thereof by the attorney for the respondent, and on October 4th the demurrer was placed upon the law and motion calendar of that department for the next motion day,—viz., October 8, 1897. On that day no one appeared in its support, and the court made an order dismissing the demurrer for want of prosecution. Rule 17 of that court, which was in force at the time the court made this order, is as follows: "When a demurrer to a pleading is overruled or sustained, ten days after notice shall be allowed the adverse party to answer or amend, unless, upon some good cause shown, further time is given. But the court reserves the right to refuse leave to answer or amend, when proper, and in granting such leave will impose such terms as it may deem proper." In making the order dismissing the demurrer, the court did not refuse leave to answer, nor did it impose any terms upon which an answer to the complaint might be made. No notice of the order dismissing the demurrer was given to the attorney for this defendant, nor does it appear that any further proceedings were had in the cause until November 23, 1899, when default and judgment thereon were entered by the clerk.

The authority of the superior court to set aside a default, or relieve a party from any proceeding taken against him

through his mistake, inadvertence, surprise, or excusable neglect, is given by section 473 of the Code of Civil Procedure; and that the exercise of this authority is confided to the discretion of the court, and will not be disturbed upon appeal therefrom, unless such discretion shall plainly appear to have been abused, has been so frequently affirmed in this court that a reference to a few of the cases will be sufficient. (*Roland v. Kreyenhagen*, 18 Cal. 455; *Watson v. San Francisco R. R. Co.*, 41 Cal. 17; *Buell v. Emerich*, 85 Cal. 116; *Harbaugh v. Honey Lake etc. Water Co.*, 109 Cal. 70; *Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co.*, 128 Cal. 619; *Melde v. Reynolds*, 129 Cal. 308; *Nicoll v. Weldon*, 130 Cal. 666.) In *Nicoll v. Weldon*, 130 Cal. 666, we said: "The granting or denying a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court, that unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default, and it does not appear that the plaintiff has sustained any prejudice thereby. This discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties."

By filing a demurrer to the complaint, an issue of law was raised, which the court was required to decide, and before any judgment could be rendered against the defendant, she had the right to have this issue of law decided, just as a defendant has the right to have an issue of fact, raised in his answer to the complaint, determined before any judgment can be rendered against him. The court would be no more authorized to strike the demurrer from the record for want of an appearance to sustain it, or to deprive the defendant of the right to have it considered, than it would be authorized to strike an answer from the files and disregard the issues raised by it, in case there should be no appearance on the part of the defendant at the time set for the trial of the cause. The order dismissing the demurrer must therefore be regarded with the same effect, and as equivalent to an order overruling it. (*Voll v. Hollis*, 60 Cal. 569; *Davis v. Hurgren*, 125 Cal. 48.)

Under the rule of the court above quoted, the defendant was entitled to receive a notice of the order dismissing the demurrer before any default could be taken against her. It is not claimed that any notice was given, and although there

are some statements in the affidavits on behalf of the plaintiff tending to show that the defendant's attorney was informed of the action of the court, they are insufficient to justify our interference with the discretion exercised in setting aside the default.

The lapse of time between the dismissal of the demurrer and the entry of the default did not take away the right of the defendant to make the application under section 473 of the Code of Civil Procedure. Until the default had been entered, there was no proceeding taken against her from which she was required to seek relief.

The order is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 671. Department Two.—September 10, 1901.]

JACOB FROWENFELD, Executor, etc., Respondent, v.
ELIZABETH HASTINGS, Appellant.

LIEN UPON PROCEEDS OF MINE—ADVANCES BY PART OWNER—CONTRACT EXCLUDING PERSONAL LIABILITY—ABSENCE OF BREACH—FORECLOSURE.—Under a contract which gave the management of a mine to one part owner, and a right to reimbursement for all advances from the proceeds of the working of the mine, but which expressly excluded any personal liability of the other part owners for any part of such advances, and did not guarantee any sufficiency of proceeds, so long as the contract is not broken by the other part owners, no lien arises for advances against their interests which can be enforced otherwise than by working the mine, and no action will lie under the contract for the foreclosure of a lien upon and sale of their interests.

APPEAL from a judgment of the Superior Court of Sierra County. Stanley A. Smith, Judge.

The facts are stated in the opinion of the court.

Bishop & Wheeler, for Appellant.

The complaint shows no breach of the contract by the defendant, and therefore does not state a cause of action. (2 Jones on Mortgages, 4th ed., sec. 471; *Steinbach v. Lesse*,

13 Cal. 363, 367; *Church v. Shanklin*, 95 Cal. 626, 629; *Van Loo v. Van Aken*, 104 Cal. 269). A promise to pay a demand out of the "proceeds" of specific realty gives no lien upon or interest in the realty. (*Hamilton v. Downer*, 46 Ill. App. 541.) A contract for payment of a demand out of the proceeds of specific property does not guarantee a sufficiency of such proceeds, unless the contract expressly so declares. (*Gibb v. Probst*, 2 Cal. 115; *McConnell v. Denver*, 35 Cal. 365, 371;¹ *Chung Kee v. Davidson*, 102 Cal. 188, 193.)

C. W. Cross, for Respondent.

The plaintiff has an equitable lien for his advances upon the interests of the other part owners, which he is entitled to enforce in equity by foreclosure. (3 Pomeroy's Equity Jurisprudence, secs. 1233-1240.)

McFARLAND, J.—This is an appeal by defendant from a judgment in favor of plaintiff. The action is to enforce an asserted lien upon the defendant's undivided interest in certain mining property, for advances of money alleged to have been made by plaintiff's testator, Goldstein, who was the owner of an undivided interest in said property. The action is based on a certain written contract made by Goldstein, the party of the first part, and the defendant herein and Mary Martha Hickey (now Mrs. Posey), also an owner in the property, parties of the second part. A similar independent action was also brought by appellant against Mrs. Posey, and an appeal by her from a judgment against her (Sac. No. 762) was submitted with the case at bar. A decision in one of the cases determines the other. The judgment in both cases enforces the alleged lien, by decreeing the sale of the defendant's interest in the property to satisfy certain amounts of money found to have been advanced as alleged. A demurrer to the complaint was filed on the general ground that it does not state facts sufficient to constitute a cause of action, and also on several special grounds.

The contract in question, which is set forth in full in the complaint, was executed on October 17, 1885. It recites that the parties are the owners of certain mines, ditches, water rights, timber lands, saw-mills, and improvements thereon, known as the properties of the Brandy City Mining

¹ 95 Am. Dec. 107.

Company, and that Goldstein owned a ten-twelfths undivided interest therein, defendant Mrs. Hastings one undivided twelfth, and Mrs. Hickey an undivided twelfth. It then recites that during six years next preceding the date of the contract the expenses of working the property had exceeded the value of the products "in a considerable amount (the exact amount being shown by the books of the company), of which the share chargeable against the interest of said Elizabeth Hastings is one-twelfth, and the share chargeable against the interest of Mary Martha Hickey is one-twelfth," and that it was deemed advisable for the development of the property to run a certain tunnel and to make other improvements, and perhaps to acquire other properties, which would require the expenditure of further sums of money, which Goldstein was willing to advance. It is then covenanted and agreed that "the said sum chargeable as aforesaid" against the one-twelfth interest each of Mrs. Hastings and Hickey "shall remain as a charge against their several and separate interests in said property," and that their respective parts (one-twelfth each) of money which had been advanced and paid out by Goldstein over and above the amounts which he had received from the property should bear interest from the date of the contract until paid at the rate of twelve per cent per annum. In this part of the contract there is the following clause: "It is distinctly understood that said parties of the second part are not, nor is either of them, personally liable to said party of the first part for the payment of said sums of money, or any part thereof."

In the subsequent and more important part of the contract it is provided that Goldstein is to advance all such moneys as from time to time shall be required for the construction of the tunnel and other purposes above mentioned, and to pay and discharge all debts "contracted by him" for such purposes, so that there shall be no suit or liens against the company, and "no liability incurred by and no suits brought against said parties of the second part by reason of any expenses incurred" for such purposes. Interest is to be allowed Goldstein for advances made, at twelve per cent per annum. Then it is provided as follows: "Whenever the proceeds resulting or to result from the working of said properties shall be sufficient to discharge all the advances hereafter to be made by the said party of the first part, and the profits from said one-twelfth interest belonging to said

Elizabeth Hastings shall be sufficient to pay and discharge the amount already chargeable against said interest, as shown by the books of the company, with interest on such part thereof as is for advances actually made, in cash, by said party of the first part, or whenever the said Elizabeth Hastings, her heirs or assigns, shall pay to the party of the first part, his heirs or assigns, her just proportion of all sums of money advanced by him and chargeable against her said interest, she shall be entitled to her said one-twelfth interest in all of said properties and in all properties that may be hereafter acquired as a part of the properties of said Brandy City Mining Company (free from all liens in favor of the party of the first part, or any other person or persons, existing by reason of any act of said party of the first part), and shall be entitled to receive one-twelfth of all the profits thereafter arising from said properties; but there shall not be, in any event, any personal liability or responsibility on the part of said Elizabeth Hastings, her heirs or legal representatives, for said advances, or any part thereof, or the interest to grow due thereon." There is a similar provision as to Mrs. Hickey. The foregoing are all the provisions of the contract necessary to be at this time mentioned.

Respondent contends that by this contract an equitable lien is created in his favor against appellant's interest in the property, and appellant contends that it does not create any kind of lien, legal or equitable, known to the law. We need not, however, determine whether or not any possible lien as security for the performance of *some* act can be discovered in the language of the contract; for it seems clear that it, at least, does not create a lien for the security of any obligation which respondent has broken. If the contract creates a lien at all, there has been no breach of any condition which would make it enforceable. A lien is well defined in section 1180 of the Code of Civil Procedure, as follows: "A lien is a charge imposed upon specific property by which it is made security for the performance of an act." Now, in the case at bar, appellant did not covenant for the performance of any act whatever, unless it may be said that she impliedly promised to allow Goldstein to manage and control the property, and to apply her share of the products or income of her one-twelfth interest to the satisfaction of his advances; and there is no averment or pretense that she did not comply with such promise; on the contrary, it affirmatively appears that

she did. We need not inquire what rights respondent would have had under his asserted lien if appellant had violated this promise. It is expressly provided in the contract that "there shall not be, in any event, any personal liability or responsibility on the part of said Elizabeth Hastings, her heirs or legal representatives, for said advances, or any part thereof, or the interest to grow due thereon." How, then, can there be a lien for these advances,—for the performance of an act which respondent never promised to perform? It is true, as counsel for respondent says, that there may be a lien for the security of money, without any absolute personal liability beyond the value of the property, as in the case of what is sometimes called a "dry mortgage," and other similar instances. But in all these cases there can be no foreclosure until a breach of condition by the failure of the party to exercise the option to pay the debt or to perform the act in the manner and at the time expressly or impliedly agreed upon. There is, in such cases, an existing liability, which a party must either meet, or allow the property charged to be taken, and thus escape personal responsibility. As was said in a New York case, "it is not essential that the personal remedy against a mortgagor shall be reserved. There is a debt *quoad* the redemption, but not in respect to the personal remedy." (*Brown v. Dewey*, 1 Sand. Ch. 72.) A lien cannot be enforced for anything other than the thing for which it was given. In the case at bar, if any lien was created by the contract, it certainly was not for any debt or liability from appellant to respondent for advances; for there never was to be any such debt or liability. The advances were to be satisfied out of a special fund,—that is, the "proceeds" of the work of the mine, and the "profits" from appellant's one-twelfth interest,—and if there was any lien at all, it was only for the enforcement of that mode of satisfaction. There was no guaranty by appellant of the sufficiency of the fund.

Respondent discusses to some extent the general law as to partnership, and the special provisions of the code as to mining partnerships; but we cannot see how the law of partnership has any applicability to the case at bar. There is an averment that down to the date of the contract,—October 17, 1885,—Goldstein, Hastings, and Hickey were mining copartners, although there is no averment that they were mining copartners thereafter, and other averments of the

complaint indicate that they were not such copartners after that date. This averment seems to have been of no consequence whatever. The action is in no sense a bill to enforce a partnership lien; it is based entirely on the said written contract and agreement. The averments are, that "by virtue of and in pursuance of said agreement," Goldstein advanced certain moneys; that the moneys in question were expended "as contemplated by and provided for in said written contract"; that one twelfth of said advances "is now due and unpaid from said Elizabeth Hastings, on account of said agreement"; that "under and by virtue of said written agreement" one twelfth of a certain sum of money is now due from Mrs. Hastings to plaintiff. The action is for the enforcement of a lien alleged to have been created by the written contract against appellant's undivided interest in the described property, not for a partnership accounting.

It is not necessary to inquire whether the views above expressed apply also to the comparatively small amount alleged to have been due from appellant before the date of execution of the contract, for that amount is clearly barred by the statute of limitations, which was pleaded by appellant.

For the foregoing reasons we are of the opinion that the complaint does not state facts sufficient to constitute a cause of action, and that the demurrer to the same should have been sustained. It is not necessary, therefore, to discuss the many other points made by appellant.

The judgment appealed from is reversed.

Temple, J., and Henshaw, J., concurred.

[Sac. No. 921. Department Two.—September 10, 1901.]

EDWARD SCHIRMER, Respondent, v. L. P. DREXLER
et al., Appellants.

WATER RIGHTS—INJUNCTION—PLEADING—PRESCRIPTIVE TITLE—FINDINGS OUTSIDE OF ISSUES—JUDGMENT ENFORCING CONTRACT.—In an action to enjoin interference with the water rights of the plaintiff, where the sole theory of the complaint was that the plaintiff had acquired a prescriptive title to the water rights by adverse user, but the findings and decree were wholly outside the issues tendered, and were based solely on the theory that the plaintiff's user of the water and ditch was with the consent of the owners, and under an oral license and agreement, which is specifically enforced by the judgment, the judgment cannot be upheld, and must be reversed.

ID.—FAILURE TO PROVE COMPLAINT—INCONSISTENT CASE IN PROOF—FAILURE TO OBJECT TO VARIANCE—NON-WAIVER.—Where the plaintiff wholly failed to sustain the burden of proof as to the allegations of his complaint, and proved an inconsistent case, going to show that the case alleged did not exist, the failure of the defendant to object to such proof cannot be deemed a waiver of the variance, so as to support findings and a decree for the plaintiff upon the inconsistent case not alleged.

ID.—RECOVERY LIMITED TO CAUSE OF ACTION ALLEGED.—A plaintiff can only recover upon the cause of action alleged, and not upon some other cause of action which may be developed by the proofs.

APPEAL from a judgment of the Superior Court of Butte County and from an order denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion.

Jo D. Sproul, F. C. Lusk, W. H. H. Hart, and Aylett R. Cotton, for Appellants.

R. C. Long, and George E. Gardner, for Respondent.

GRAY, C.—This action was brought to obtain an injunction against further interference with certain water rights of plaintiff and for damages for previous interferences. The defendants appeal from a judgment in plaintiff's favor and from an order denying a new trial.

The complaint alleges title and possession in plaintiff of certain described tracts of land, and "that for more than sixteen years last past, and up to the time of filing the com-

plaint herein, the plaintiff, Edward Schirmer, and his grantor, have been, and he is now, the owner and in the possession of . . . the right to use thereon, for irrigating and mining the same, twenty inches of the water flowing in that certain stream situated in said county and known as 'Big Butte Creek.' " Then follows a long statement of facts, all intended to show that plaintiff had acquired a title to the water in controversy by the original appropriation thereof by his predecessors in interest, and the subsequent continuous adverse use thereof for sixteen years, and down to the commencement of this action. The allegations of the complaint also seem to tend in the direction of showing that plaintiff is the owner of an interest in a certain ditch and flume by reason of succeeding to the interest of one of the original constructors thereof, but the complaint contains no direct averment that plaintiff owns any of the ditches or the flume referred to therein, or that he owns any interest or right in either. The complaint also alleges that at frequent times during the sixty days immediately preceding the bringing of the action, the defendants had diverted the water from said flume and ditches, without any right so to do, and had deprived plaintiff of the use thereof, to his damage in the sum of eight hundred dollars. The complaint concludes with a prayer for said damages, and for an injunction compelling defendants to remove the dams they had placed in the ditch, and refrain from further interfering with the flow of the water therein.

The answer contains specific denials of the allegations of the complaint, together with affirmative allegations showing the title to the said water and ditch to be in the defendant L. P. Drexler.

The findings in the case, with reference to the various interests and rights in the said ditch and waters, are as follows: "That in the year 1876 the defendant James W. Peters and John Christy cleaned out and put in order, so that water could be run through, what was known as the Burson ditch, which headed in Butte Creek, on the westerly side thereof, and conducted the waters down to the point of diversion referred to in the pleadings, where the Cable ditch and flume conveyed it across Butte Creek to the ranch of the plaintiff, at which place it was used for mining purposes, off and on, till the year 1883, when it began to be used for household and irrigation purposes, which uses continued un-

interruptedly, with the consent of the owner thereof, until some time in June, 1899, when the defendant L. P. Drexler dammed up plaintiff's ditch, and deprived him of the further use of said water; the Burson ditch was held by Peters and Christy, as partners, for about two years, when Christy sold his half to one Browning, and the latter and Peters were equal partners in it for about two years, when they quarreled, and Browning sold his half to one Isom De Long, and De Long and Peters used and were the owners of the ditch and the water right until March or April, 1881, when Peters claimed that De Long owed him (Peters) some sixty dollars for work done on the ditch in repairing it, and refused to let him have anything to do with the property till that sum was paid, and thereupon De Long gave the grantor of plaintiff all of his (De Long's) interest in and to the water right and ditch, and Cable, plaintiff's grantor, used a portion of the water during the summer and winter of 1881-82 in mining; that in the fall of 1882 the said Cable moved from the place and abandoned the ditch, and did not return to the lands of plaintiff till some time in the fall of 1883, at which time he purchased the interest of one Christopher C. Maltby in and to said real estate, being the real estate set out in plaintiff's complaint and the following winter began to set out the orchard described in the complaint, and during that season planted at least five hundred trees, and continued to plant others, year by year, until he had an orchard containing the number of trees enumerated in the complaint; that in order to raise these trees it was necessary that they should be frequently irrigated, and without irrigation they would neither root nor grow; that, under an agreement made by the said Frank L. Cable with said James Peters, at or about the time said orchard was planted, the said Cable was to have all the water necessary for household purposes, and for the irrigation of such orchard as he, Cable, had or might set out, on condition that he, Cable, should assist in cleaning out the ditch each year, and that in pursuance of such agreement the said Cable planted said orchard, received said water, year after year, until June, 1899, and after the work of cleaning the ditch for that year had been performed by Cable, when defendant L. P. Drexler shut off the water running to the orchard of this plaintiff, as charged in the complaint; that by reason of obstructing the flow of said water to the lands of plaintiff, as aforesaid, the orchard of plaintiff ceased

to bear fruit, and a number of the trees died, and he has been damaged in the sum of \$450, and if the obstruction is maintained during another fruit season, the entire orchard will be destroyed and rendered of no value; that on the seventeenth day of March, 1888, the said James W. Peters, sold and conveyed to the defendant L. P. Drexler the said Burson water-ditch and water right, being the same ditch taken up and cleaned out by him and Christy in 1876, reserving to himself the right to use sixty inches, but not to sell the same to any other person for any purpose; that at the time of said sale by Peters to Drexler, the said Cable, plaintiff's grantor, was using the water to the extent of ten inches, at least, the same being diverted from the main ditch by the Cable ditch, and conducted to the residence and orchard of the said Cable for household and irrigation purposes, and thereafter continued to use the same for said purposes, year after year, until June, 1899, with the knowledge of the said defendant Drexler, during which time the said Cable yearly performed on said ditch the same, or about the same, amount of work in cleaning it out and assisting in keeping it in repair that he had done before the sale was made by Peters to Drexler; . . . that the said Cable ditch and flume carries and has carried for many years last past—to wit, more than twenty years—at least ten miner's inches of water, measured under a four-inch pressure, and the same have been put to a useful purpose, and it requires that number of inches to successfully raise said orchard on plaintiff's said land and to supply the house with water for domestic purposes. . . . I further find that some time in winter of 1881-82, Frank L. Cable, the grantor of plaintiff, was the owner of the undivided one half of the Burson ditch; that he left Butte Creek, where the ditch is, and went away, uncertain as to whether or not he ever would return, but did return in the fall of 1883, and with the permission of James W. Peters used the water of the Burson ditch, diverted by means of the Cable ditch and flume, and taken to the east side of Butte Creek, to plaintiff's premises described in the complaint, to plant and raise the orchard set forth in plaintiff's complaint, paying for said water by labor performed in cleaning out and keeping in repair said Burson ditch, to the extent of an average of two weeks' work yearly, down to and including the year of 1899, and that after he had paid

for the water of 1899, the same was prevented from running to the lands of plaintiff by the defendant Drexler, under the pretense that his orchard required all that was running in the ditch; that if the defendant is permitted to maintain his obstructions to the flow into the Cable ditch and flume, the property of plaintiff will be entirely destroyed, and his place unfit for habitation."

Upon these findings the court gave plaintiff judgment for \$450 damages, and decreed as follows: "That the plaintiff have at all times the free and uninterrupted use of ten inches of the water flowing in the Burson ditch, to be diverted at the place and in the manner heretofore diverted, *on the payment of a reasonable compensation therefor yearly*; that the defendants, and each and every of them, and also their agents, attorneys, employees, and all persons acting under, by, or through them, or either of them, are hereby forever restrained, enjoined, and prohibited from interfering in any manner with either of said ditches or flumes, or the water flowing therein, so as to in any manner prevent or hinder the flow of said water to the lands of plaintiff, to the extent of ten inches."

Waiving such minor defects in the foregoing findings as their failure to show any transfer of anything by Cable to the plaintiff, and their consequent failure to show that plaintiff ever acquired any interest in the alleged contract or arrangement between Cable and the defendant Peters, upon which the decree in said plaintiff's favor seems to be based, we will proceed at once to the proposition in the case which strikes us with the greatest force. The findings and decree seem to be entirely outside of the case made by the pleadings. The said findings and decree contradict the material allegations of plaintiff's complaint, and there seem to be no allegations at all in the complaint to which the findings and decree can be held to be material or pertinent. The whole theory of the complaint is, that the plaintiff's rights are those of an owner, acquired by adverse use of the ditch and the water. The findings and decree proceed upon an entirely different theory, and expressly state that the use of the water and of the ditch by plaintiff and his predecessor in interest therein was had with the consent of the owners thereof and under an oral license or agreement therefor. The decree attempts to enforce the specific performance of a contract which is not only not set up in the complaint, but

to which no reference is made anywhere in the pleadings. We know that there are cases which hold, as contended by respondent, that where a question is treated by both parties as an issue in the case, and evidence is taken thereon without objection, the appellant will not thereafter be heard to say that the question was not in issue. That is a salutary general rule, and we do not wish to overturn it. But in none of those cases, that we have been able to find, were the findings and decree clear outside of the case as made by the pleadings, but in each and all of them the findings, taken all together, have some relation to the issues as framed; but here the issues as made by the pleadings sustain no degree of kinship whatever to the findings and decree, and are, besides, in direct conflict with the allegations of the complaint. It would be going too far to hold that such a variance as this should be deemed to be waived by failure to object to evidence at the trial. If the burden was on the plaintiff to establish the case made by his complaint, why should the defendants object to evidence, as long as it went to show that the case as thus made did not exist? If this kind of a judgment can be upheld on this kind of a record, then written pleadings are no longer necessary, and may well be dispensed with altogether.

As supporting the position we here take, we cite as follows: *Dobbs v. Purington*, XXII Cal. Dec. 245; *Wallace v. Farmers' Ditch Co.*, 130 Cal. 578; *Reed v. Norton*, 99 Cal. 617; *Murdock v. Clarke*, 59 Cal. 683; *Green v. Chandler*, 54 Cal. 626; *Morenhout v. Barron*, 42 Cal. 605. In *Riverside Water Co. v. Gage*, 108 Cal. 240, speaking of a waiver by failure to object to evidence on the trial, in this connection the court says: "This rule, however, has no application in a case where, at the trial, evidence is introduced which is outside of any issue which is presented by the pleadings." "A plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs." (*Reed v. Norton, supra.*)

Several other points are made by appellants on questions of law, and the sufficiency of the evidence in several particulars is also challenged; but as it is impossible to determine from the record before us what form the case will take upon another trial thereof, we deem it unnecessary to determine any further question in the case.

We advise that the judgment and order appealed from be reversed, with directions to the court below to permit the parties to amend their pleadings if they be so advised.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with directions to the court below to permit the parties to amend their pleadings if they be so advised.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 749. Department Two.—September 11, 1901.]

THE PEOPLE, Respondent, v. EDWARD RODRIGUEZ,
Appellant.

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION OF DEFENDANT—RESIDENCE—COLLATERAL QUESTIONS—IMPEACHMENT—PREJUDICIAL ERROR.—Where a defendant, accused of crime, testified only as to his present residence out of the county of the venue, he cannot be properly cross-examined as to his residence in the county at a time long prior to the date of the offense charged; and his answers to collateral and irrelevant questions about such prior residence are conclusive, and cannot be contradicted for the purpose of impeachment. The admission of the testimony of the sheriff in contradiction of the defendant, that he was at such prior date in the county, at the county jail, was prejudicially erroneous, and the error was not cured by striking out the allusion to the county jail.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order denying a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

John H. Leonard, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

McFARLAND, J.—The defendant was convicted of the crime of burglary in the second degree. The alleged offense

consisted in breaking into a shop and stealing a violin. Defendant appeals from the judgment and from an order denying his motion for a new trial.

There was evidence properly admitted, which tended to show appellant's guilt; but we cannot know whether or not the jury would have convicted him without evidence which was improperly admitted as hereinafter noticed.

If the crime was committed at all, it occurred, as averred in the information, on or about the fifteenth day of July, 1900. The trial took place September 4, 1900. The appellant was a witness for himself, and he began his testimony as follows: "My name is Ed Rodriguez; I live in Watsonville." He said nothing more about his residence. On cross-examination, he was asked these questions: "Where were you living last October?" "Now, Mr. Rodriguez, remember you are under oath, where did you stay last October?" "During the months of September, October, and November, where did you live?" "Don't you know, as a matter of fact, that during those months I have mentioned you were here in Santa Cruz?" Other questions of a similar character were asked about his residence during those months—which were about a year prior to the time of the trial, and about nine months prior to the time of the alleged commission of the crime,—and the questions were all allowed over appellant's objection that they were "irrelevant, immaterial, incompetent, not cross-examination." Appellant's answers to these questions were of a negative character; he said that he lived during those months at a place other than Santa Cruz. In rebuttal, the prosecution called the sheriff of the county and asked him if he knew where the appellant resided during the months of 1899 above mentioned, and over the objections of appellant to the question, he gave testimony as follows: "A. I know where he was from the 21st of September to the 10th of December. Q. That includes the months I have spoken of?—A. Yes, sir." After another objection, ruling, and exception, the witness answered further, as follows: "A. He was in the county jail. Q. Where?—A. In Santa Cruz." Counsel for appellant moved to strike out the answers, and the court said, "The county jail part will be stricken out."

It is beyond doubt that the allowance of the testimony above stated was erroneous. The questions asked on the cross-examination of appellant were not in relation to any

testimony given on his direct examination, and they would have been inadmissible if he had been an ordinary witness, without considering any protection given to a defendant when a witness for himself, by section 1323 of the Penal Code. The only testimony given by appellant on the subject of residence was as to his residence at the time he was testifying, and there is no pretense that the questions asked on cross-examination were for the purpose of disproving his testimony as to his present residence. If nothing further had occurred on the subject it possibly might have been held that appellant had not been prejudiced by the allowance of these improper questions; but when the prosecution, after having been allowed to introduce this irrelevant and collateral matter, was also allowed to introduce a witness to contradict what appellant had said on the subject, a different question is presented. "A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness, which is collateral and irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but is conclusive against him." (*People v. McKeller*, 53 Cal. 65; 1 Greenleaf on Evidence, sec. 449.) The testimony of the sheriff contradicting the appellant on the collateral and irrelevant matter was therefore clearly inadmissible, and it would be idle to say that it could not have been prejudicial to appellant. In the first place, it tended to "discredit his testimony," and in the second place, it tended to prove the commission of another and independent crime, which, of course, was entirely unwarranted. Something is said in respondent's brief about the statement of the sheriff that appellant was in the county jail being "voluntary"; but his examination by the people leads strongly to the conclusion that the statement in question was the anticipated and intended ultimate aim and outcome of his whole testimony. The remark of the court that "the county jail part be stricken out" did not remedy the evil; it could not be stricken out of the minds of the jury.

For the foregoing reasons the judgment and order appealed from are reversed and the cause is remanded for a new trial.

Temple, J., and Henshaw, J., concurred.

[Crim. No. 803. In Bank.—September 11, 1901.]

Ex parte HENRY PFIRRMANN, on Habeas Corpus.

LICENSE TAX—POWER OF SUPERVISORS IN MUNICIPALITIES REPEALED.—

Under the act of 1901 (Stats. 1901, p. 635), adding section 3366 to the Political Code, the power of county supervisors to license business for revenue purposes within the limits of municipalities is repealed by necessary implication; and they are forbidden to impose any license tax, either for purposes of revenue or regulation, within such limits.

ID.—CONSTITUTIONAL LAW—TITLE OF ACT—DUPLICITY—SINGLE SUBJECT-MATTER.—

The title of the act of 1901 entitled "An act to add a new section to the Political Code of the state of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees, in their respective counties, cities, and towns, to impose a license tax," is in furtherance of section 11 of article XI of the constitution, and there is no duplicity in the subject-matter. It contains a single subject-matter, relating to the issuance of licenses, for regulative purposes, by counties, cities, and towns.

ID.—CONSTRUCTION IN RELATION TO TITLE—"LICENSE TAX"—PRESUMPTION OF VALIDITY.—

The act of 1901 is to be presumed valid and so construed, if possible. The words "license tax," in the title, will not be construed to mean "license taxes for revenue," which are thereby repealed, but are to be construed as synonymous with "license fee or charge," as a police regulation.

ID.—CONSTRUCTION OF CONSTITUTION—POWER OF LEGISLATURE.—

Section 12 of article XI of the constitution, forbidding power to the legislature to impose taxes for county, city, town, or other municipal purposes, but authorizing it by general laws to vest power in the corporate authorities to assess and collect taxes for such purposes, does not prohibit the legislature from forbidding them to collect a license tax for revenue.

ID.—EFFECT OF SPECIAL INCONSISTENT ACT OF SAME DATE.—

The special act of the same date with the act establishing section 3366 of the Political Code, applicable only to municipal corporations of the fifth class, and inconsistently providing for power of such corporations to license for purposes both "of regulation and revenue," if it be considered as passed subsequently, could only operate to repeal that section *pro tanto*; and if considered as an unconstitutional special law, it will not be construed to render void the general law by being incorporated therein, and read as part thereof.

APPLICATION to the Supreme Court for writ of *habeas corpus* to the chief of police of the City of Los Angeles.

The facts are stated in the opinion of the court.

Taylor & Mason, Frank James, and Frank G. Finlayson, for Petitioner.

Thomas P. Boyd, City Attorney of San Rafael, Guy R. Kennedy, City Attorney of Chico, and A. Webster, City Attorney of Paso Robles, *amici curiae*, for Petitioner.

James C. Rives, District Attorney, Curtis D. Wilbur, Chief Deputy, and F. R. Willis, Deputy, for Respondent.

GAROUTTE, J.—Petitioner is restrained of his liberty upon a charge of violating an ordinance of the county of Los Angeles, in refusing to pay a liquor license of fifteen dollars per month, prescribed by the aforesaid ordinance. He is a resident of the city of Los Angeles, conducts his liquor business therein, and pays the license demanded by the ordinances of said city.

Whether or not the license fee or tax demanded by the county of Los Angeles under its ordinance be considered a fee or tax for revenue or for regulation of the business, is an immaterial matter; for, by virtue of the provisions of an act of the legislature (Stats. 1901, p. 635), a county has no power to demand a license fee or tax, either for purposes of revenue or regulation, from persons carrying on business within the limits of municipalities. Among other matters, that act provides: "Boards of supervisors of the counties of the state and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions."

Prior to the passage of the aforesaid act, it may be stated that the law was settled to the effect that within municipalities a board of supervisors had no power to enact police and sanitary measures, and therefore had no power therein to impose a license fee or tax for the purpose of regulating the liquor business, or any other business. In the absence of some direct and explicit constitutional provision, this court would not declare the existence of such a power; for difficulties and confusion arising from a clash of jurisdictions would be the only result to follow, if both the county and the mu-

municipality possessed the power of enacting police and sanitary measures within the confines of a municipality. It is said in *Ex parte Roach*, 104 Cal. 277: "It is not to be supposed that it was the intention of the people, through their constitution, to authorize a county to exercise the same power within the territory of the city as the city itself could exercise, or to confer upon the county the right to interfere with or impair the effect of similar legislation by the city itself." And in construing section 11 of article XI of the constitution, wherein is found this grant of power to counties and municipalities to enact police and sanitary regulations, this court said, in the same case: "Full effect can be given to the section by holding that each has been given the exclusive right of legislation within its own particular boundaries. By the organization of a city within the boundaries of a county, the territory thus organized is withdrawn from the legislative control of the county upon the designated subjects, and is placed under the legislative control of its own council; and the principle of local government which pervades the entire instrument is convinctive of the intention to withdraw the city from the control of the county, and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confided to its control." It is claimed upon the part of respondent, that *Ex parte Roach*, 104 Cal. 277, only goes to the extent of holding that where a conflict arises between the respective regulating ordinances of a county and municipality, that then, in such a case, the ordinance of the municipality within its jurisdiction is controlling. *County of Los Angeles v. Eikenberry*, 131 Cal. 461, to some extent places this construction upon *Ex parte Roach*, 104 Cal. 277. But, as is plainly seen from the language taken from the opinion of the court, it has a much broader meaning, and the construction there given the constitutional provision is manifestly the correct one. If for no other reason, the unfortunate results which would necessarily follow from a judicial holding that the powers of counties and municipalities derived from the constitution as to the enactment of police and sanitary measures within the municipality were concurrent, justified the conclusion declared in *Ex parte Roach*, 104 Cal. 277. It may be here suggested that the power of counties to license business undertakings carried on within municipalities, for the purposes

of raising revenue, is conceded to have existed prior to the aforesaid act of 1901. (*County of Los Angeles v. Eickenberry*, 131, 461.)

In view of what has been said, it is apparent that the result of this litigation is dependent wholly upon the validity of the act of 1901, and the construction to be given it if it be declared a valid law. This is evident because, tested by its face, it denies to boards of supervisors the power to license any and all branches of business for the purposes of raising revenue, and also limits their power to that of collecting a license for regulation only without the limits of municipalities. As we have already seen, boards of supervisors, prior to this enactment, possessed only power to license within municipalities for revenue purposes, and that power now being taken away by this act of the legislature, leaves such boards without power to levy and collect by ordinance, within municipalities, any license tax or fee whatever. If the law be valid and this be its proper construction, then the petitioner must be discharged from custody, for he is charged with violating a county ordinance, and, as disclosed by the facts, is engaged only in conducting his business within the limits of the city of Los Angeles.

It is insisted that the act must fall, by reason of a defective title, in this, that the title contains more than one subject-matter. We will not look for a constitutional provision forbidding duplicity of titles, for we fail to find two distinct and different subject-matters of legislation outlined by the title of the act. That title reads as follows: "An act to add a new section to the Political Code of the state of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees in their respective counties, cities, and towns, and to impose a license tax."

1. It is now contended that the subject-matter of the title is duplex, in this, that it purports to treat of the powers of counties exercised through their boards of supervisors, and also of the powers of municipalities exercised through the medium of their governmental bodies. This act, by title, treats of the power of counties and municipalities to issue licenses and charge a fee therefor, under the authority vested in them by the aforesaid provision of the constitution. Such legislation is in line with and in direct furtherance of that

provision. The power is a power vested in common, in the county and the municipality within their respective jurisdictions, and this title deals with this power alone. The power being in common, there is no duplicity in the subject-matter of the title, and the act is unobjectionable upon the ground urged.

2. A second objection is made to the title, in that the language, "and to impose a license tax," means "a license tax for revenue." It is then insisted that the body of the act, instead of providing a license tax for revenue, repeals all license taxes for revenue theretofore existing. If the construction of this language contended for by respondent would result in destroying the validity of the title of the act, and that result would be followed by a destruction of the act itself, this court would be very slow in arriving at such a construction; for the act should be declared valid by this court, if its invalidity does not plainly appear. All doubts are to be resolved in favor of its validity, and likewise all proper presumptions are to be invoked to that end. For these reasons alone, the court feels justified in construing the words "license tax" as synonymous with "license fee or charge"; for the words "license tax" do not necessarily and always mean a license tax assessed and collected for purposes of revenue. In *Ex parte Ah Toy*, 57 Cal. 92, this court said: "The ordinance is authorized by the legislature, and is a part of the local police regulation of the city, and relates to matters within the city. Our attention has not been called to any general statute which, in terms or by implication, prohibits the imposition of a license tax as a police regulation." (See also *State v. Camp Sing*, 18 Mont. 143.¹) All that has been said in sustaining the validity of the title of the act of 1901 may with even more propriety be said as to the validity of the legislation found in the body of that act; and that the body of the act contains but one subject-matter of legislation, as contemplated by the constitution, the court has no doubt. It contains a single subject-matter, and that subject-matter consists of legislation relating to the issuance of licenses for regulation purposes by counties, cities, etc. Many acts covering the gravest subject-matters of legislation are found upon the statute books, which apply, in terms, to both counties and cities,—as, for example, the Purity of Elections Act and the Australian Ballot Law. No one has

¹ 56 Am. St. Rep. 551.

had the temerity thus far to attack their constitutionality upon the ground here urged.

Prior to the act of 1901, boards of supervisors, by virtue of subdivision 25 of section 25 of the County Government Act, possessed the power to collect a license tax for revenue in all parts of the county. But the act of 1901 must be held to repeal, by implication, the power thus granted. The later act provides: "Boards of supervisors . . . shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business," etc. This language is too plain to be construed. It speaks for itself, and declares that boards of supervisors may issue licenses for the purpose of regulation alone. The words "not otherwise" curtail and cut off all power boards of supervisors theretofore had to issue licenses and charge therefor as a revenue measure. Some point is made that the phrase, "and not otherwise," should not be construed as relating to and qualifying the powers of the board of supervisors, but should be held to relate to the phrase, "as herein provided." This contention is unsound for many reasons. The punctuation of the section alone plainly marks a contrary construction. Indeed, it may be said that every feature of this act of 1901 indicates a plain purpose upon the part of the legislature to restrict the licensing power of boards of supervisors and city councils to matters of regulation alone. Further than that, it may be said that the trend of our state policy at the present time looks toward a cessation of legislation which has for its purpose, the raising of revenue by the collection of direct taxes, under the guise of a license, as a condition precedent to the conduct of business. Such legislation seems to be considered an impolitic burden resting upon legitimate business, and a fine assessed upon commercial enterprise.

It is next claimed that the legislature, in effect, is prohibited by section 12 of article XI of the constitution from enacting a law preventing counties, cities, etc., from levying and collecting a license tax for revenue. That section of the constitution is as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the

corporate authorities thereof the power to assess and collect taxes for such purposes." There is nothing in this provision justifying the contention made. Even construing the verb "may" as mandatory in effect, still the contention is without force. By this provision of the fundamental law the legislature is directed to vest the power in counties, cities, etc., to assess and collect taxes. If the legislature grants this power to these subordinate divisions of the government, it has the right to say, by the grant, in what manner that power shall be exercised. And therefore it has the right to say that taxes shall be assessed and collected upon real and personal property alone. Indeed, that body may go one step further, as it has done by section 3366 of the Political Code, and declare that taxes shall not be assessed and collected in the form of a license charge upon the right to carry on business.

The following contention is made by the district attorney of Stanislaus County, as *amicus curiae*: Section 3366 of the Political Code, constituting the act under consideration, went into effect March 23, 1901. Upon the same day an act went into effect (Stats. 1901, p. 656), relating to the powers of municipal corporations of the fifth class. Subdivision 10 of that act, relating to the powers of such municipalities, reads: "To license, for purposes of regulation and revenue, all and every kind of business, including the sale of intoxicating liquors, authorized by law and transacted or carried on in such city," etc. This subdivision deals with the same subject-matter as is covered, in part, by section 3366, and, as seen, directly provides that municipalities of the fifth class may license various branches of business for the purposes of raising revenue. *Amicus curiae* invokes the doctrine of *Davis v. Whidden*, 117 Cal. 618, to the effect that, in the absence of any showing to the contrary, it will be presumed that the various acts of the legislature are printed and published in the statute-books in the order in which they were approved by the governor. He then insists that by the application of the principle of law thus declared, the municipal act is the later act, and therefore repeals section 3366 by implication. A complete answer to his contention in this regard may be found in the fact, that, even conceding a repeal by implication took effect, it would only be a repeal *pro tanto*—that is, the repeal would only affect municipalities of the fifth class, and that class is not involved in this litigation.

Amicus curiae takes a second position, whereby he insists that section 3366 should be held unconstitutional, and in this regard, his position as to the construction of the act is seemingly antagonistic to the first position occupied; for he now invokes *People v. Jackson*, 30 Cal. 427, wherein it is held, "Where two laws are passed on the same day, in relation to the same subject-matter, they are to be read together as if parts of the same act." It is then insisted that these two acts, having taken effect upon the same day, constitute, in effect, one act, and that such consolidated act is unconstitutional, for the reason that it contains special and local legislation; and that it contains special and local legislation is maintained in view of the decisions of this court in cases similar to *Pasadena v. Stimson*, 91 Cal. 238. The doctrine of *Davis v. Whidden*, 117 Cal. 618, appears to be opposed to a construction which demands the consolidation of two acts, which go into effect upon the same day. But beyond that, if the contention be true that subdivision 10 of the municipal act is unconstitutional and void, as being local and special legislation, then this court certainly will not transplant and construe a void special law into section 3366, a valid general law, if the result of such transplanting would be to render void the valid general law.

For the foregoing reasons the petitioner is discharged from custody.

McFarland, J., Van Dyke, J., Henshaw, J., Beatty, C. J., and Temple, J., concurred.

[S. F. No. 2550. Department One.—September 13, 1901.]

JOHN FARNHAM, Appellant, v. P. BOLAND, Respondent.

ELECTION BALLOTS—IDENTIFYING MARKS—PURPOSE OF STATUTE.—The purpose of the provision of section 1215 of the Political Code, that “no voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him,” is to destroy the identity of the ballot, and thereby maintain its secrecy, which is one of the cardinal principles on which the present ballot law is founded. It is intended to cover any mark made by the voter which may serve as a distinguishing mark, whether made with the legally authorized stamp, or with an ordinary pen or pencil.

ID.—USE OF AUTHORIZED STAMP—COMPLIANCE WITH LAW.—If, in the use of the authorized stamp, the voter keeps within the law, the ballot will not be rejected, even though the stamp has been so used that the cross may be an identifying mark, and the ballot should not be rejected for trivial reasons; but the court will do the best it can to hold the voter to a strict compliance with the statute forbidding identifying marks with the use of the stamp.

ID.—UNAUTHORIZED USE OF STAMP—BALLOTS REJECTED.—Ballots must be rejected where, by an unauthorized use of the stamp, a cross is placed in a square opposite which there is no candidate's name, or upon a line between two squares, each of which is also properly marked, or where two crosses are placed after a candidate's name, either one within the square and one outside of it, or two within the square, whether separate or interlaced. Each and all of such marks are identifying marks by the voter, prohibited by the statute.

ID.—BALLOTS WITH STUB OR NUMBER ATTACHED—CARELESSNESS OF ELECTION OFFICERS—VOTER NOT PREJUDICED.—The law only forbids identifying marks made by the voter; and ballots cast with the stub attached, which should have remained in the ballot-book, or bearing the number which it was the duty of the election officers to remove, should not be rejected. The misconduct or carelessness of the election officers in the discharge of their duty cannot prejudice the voter, where a fair election and honest count are not thereby prevented.

ID.—ELECTION CONTEST—REVIEW UPON APPEAL—EXCEPTIONS—ADMISSION OF BALLOTS FOR APPELLANT—PRACTICE—DECISION.—Upon appeal in an election contest, where the appellant assigns error in the admission of ballots cast for the respondent, it is proper practice for the respondent to have inserted in the bill of exceptions the exceptions taken to the rulings of the court in the admission of ballots cast for the appellant. Where the whole case is not presented in the record upon the appeal, if error appears in favor of the appellant, this court, in deciding the case, will not render or order final judgment, but will remand the case for a new trial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

Carlton W. Greene, and Burbank G. Somers, for Appellant.

M. C. Hassett, and Walter J. Thompson, for Respondent.

GAROUTTE, J.—This is an election contest, brought under the provisions of sections 1111-1127 of the Code of Civil Procedure, and involves the office of public administrator in and for the city and county of San Francisco. Contestant, Farnham, appeals from a judgment rendered against him, whereby it was held that Boland received 203 votes more than Farnham received, and was declared elected. Various rulings of the court, arising upon the admission in evidence of certain ballots for Boland, are urged as error upon this appeal.

In addition to other matters, section 1215 of the Political Code declares, "No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him"; and the fundamental objection, going to all of the ballots here under consideration, is made, that it appears from an inspection of them that the law above quoted has been violated by the voter, and for that reason it is insisted they should have been rejected, and not counted. The purpose of this provision of the law is to destroy the identity of the ballot, and thereby maintain its secrecy; for secrecy of the ballot is one of the cardinal principles upon which the present ballot law is founded, and that principle thoroughly permeates the entire body of the act.

Some difficulty arises in declaring the rule by which the ballots here under consideration should be tested. The law itself is largely a recent importation from a foreign jurisdiction; and while it is in substance found upon the statute-books of many states, sufficient time has not yet elapsed since its importation, for the courts of all those states, in the judicial construction of its many and complex provisions, to stand upon common ground. At this time the decisions of the various state courts upon the construction of the act are not at all uniform, and therefore those decisions, as guiding lights to the true rule of construction, are not valuable aids, and will not be largely relied upon here. Most

of the questions presented upon the inspection of these ballots have been considered, in principle at least, by the former decisions of this court, and the law of those decisions will in a great measure form the test by which these ballots will be tried. The statute says: "No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him." This language is broad. It is broad enough to cover any mark made by the voter which may serve as a distinguishing mark; and this distinguishing mark may be made with the legally authorized stamp, equally the same as with an ordinary pen or pencil. And while the law may be too weak to reach all *distinguishing marks* which may be made with the authorized stamp, still the court will do the best it can to hold the voter to a strict compliance with this provision. If in the use of the stamp the voter keeps within the law, then the ballot will not be rejected, even though the stamp has been used so that the cross made may be an identifying mark. Ballots should not be rejected for trivial reasons; at the same time, it is only by a compliance with this law that the evils may be met and overthrown which were the cause of its birth. Under express constitutional authority the legislature has the power to enact all reasonable regulations for the protection of the purity of the ballot. Those regulations the voter is bound to know, and bound to abide by; and if he does not abide by them, his exercise of the right of franchise may be denied him, and no one of his constitutional rights invaded. In *Tebbe v. Smith*, 108 Cal. 108,¹ and *Lauer v. Estes*, 120 Cal. 654, the law governing this question of identifying marks is fully declared, and is strictly in line with the general observations the court has above advanced; and keeping in view the principles declared in those cases, we pass to an inspection of the ballots here under consideration.

Under objection No. 1 we find a class of ballots counted by the trial court, where a cross is placed in a square, there being no candidate's name opposite the square. Such a cross is not in a legal place. The voter had no right, under the law, to place it there, and it is a distinguishing mark, which demands the rejection of that class of ballots. Under objection No. 2 a cross is found upon a class of ballots, directly upon the line dividing the two squares. There is also a cross

¹ 49 Am. St. Rep. 68.

in each of said squares, after the respective candidates' names. Thus there is found a cross not authorized by the law, which may well serve as a means of identifying the ballot, and ballots so marked should be rejected. Under objection No. 3, the court finds a class of ballots where two crosses are made after the candidate's name—one within the square and one without the square. There is no simpler way of evading the provision of the law than for a voter to mark his ballot in this manner. These crosses, so placed, are clearly identifying marks, and all ballots so appearing should be rejected. Under objection No. 4, the court finds a class of ballots with two crosses in the square. Upon some of these ballots the crosses are entirely separate, and upon others they are interlaced and joined in many different ways. The law says the voter shall stamp a cross after the name of the candidate—not two crosses or three crosses, but "a cross." Two crosses in the square is no less a mark of identification than two crosses, one without and one within the square. An allowance of this practice would furnish a simple expedient by which the law could be violated. Two crosses in the square is not a legal mark upon the ballot. The law only contemplates one cross, and therefore ballots so marked should be rejected.

It is claimed that the trial court should have rejected ballots which had the stub attached to them—a stub that should have remained in the book from which the ballots were taken. We hold that these ballots were properly counted; and likewise those ballots were properly counted which the officers of election placed in the ballot-box without first tearing therefrom the numbers attached. It is quite apparent that these violations of the law arose from the carelessness of the election officers. Such carelessness or malconduct upon the part of those officers may render them liable to severe penalties; but that is all. The law as to identifying marks refers to marks made by the voter, and it is only marks made by him that demand the rejection of the ballot. After citing many cases to the point, this court said, in *People v. Prewett*, 124 Cal. 13: "The principle underlying these decisions is, that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of election, unless it shall appear that a fair election and an honest count were thereby prevented."

Appellant asks for judgment in his favor, upon the record

before the court, claiming that this being an election contest, and therefore largely a summary proceeding, it should be finally disposed of without further delay. The record brought here upon appeal fails to disclose exceptions taken to the rulings of the court in the admission of ballots cast for appellant. The proper practice would have been for respondents to have inserted those rulings and exceptions in the transcript by way of amendment to the bill of exceptions. If that had been done, possibly it may have appeared that the errors of the trial court relied upon by appellant here were without prejudice. (*Webster v. Byrnes*, 34 Cal. 277.) Yet, even conceding power in this court to order the trial court to enter judgment in favor of appellant—a practice which must be recognized as an exception to the general rule, where findings of fact are set aside as unsupported in the evidence—still the court is not inclined to make the order in this case. In the many recent election contests that have been presented here by appeal, it appears to have been the rule, without exception, to return the cause to the trial court for further hearing, when the judgment has been reversed, and we will not depart from that practice in this case. At the same time, in so doing, the action of the court must not be construed as establishing a precedent which will be followed in every case of this character brought here upon appeal.

For the foregoing reasons the judgment is reversed and the cause remanded.

Harrison, J., and Van Dyke, J., concurred.

Modification of judgment denied.

Beatty, C. J., dissented from the order denying a modification of the judgment, and filed the following opinion on the 14th of October, 1901:—

BEATTY, C. J.—The appellant has petitioned for a modification of the judgment herein. He asks that instead of remanding the cause for a new trial, this court should direct the entry of a final judgment in his favor, and I think he is clearly entitled to that relief, upon the record as it stands.

The substance of the material findings of the superior court is, that, according to the canvass by the election board, the respondent received 24,018 votes and the appellant 23,753,

but that 683 marked and otherwise illegal ballots had been improperly counted for respondent in making that canvass, and 621 marked and otherwise illegal ballots improperly counted for appellant, so that, after deducting the ballots thus improperly counted for the respective parties from the vote as returned, the true count showed that respondent had received 23,335 votes, and appellant 23,132 votes, leaving the respondent a plurality of 203 votes.

Such were the findings of the superior court, but this court, in view of the sole and uncontradicted evidence in the case,—the ballots themselves,—decides that about fourteen hundred ballots counted for respondent by the superior court were illegal and void. It decides, in other words, that the finding in favor of the respondent is erroneous, and wholly unsustained by the evidence, to the extent of fourteen hundred votes, and that he really received twelve hundred legal votes less than appellant is found to have received. On the findings as thus corrected, the appellant is entitled to the office, and to a final judgment in this court. But he is deprived of that relief because the record does not contain the exceptions of the respondent to the rulings of the superior court admitting or rejecting ballots, and it is *surmised* that if these exceptions were in the record it might appear that erroneous rulings were made upon ballots objected to by respondent, but counted for appellant, sufficient in number to neutralize or overcome the errors which we have held were committed in counting illegal ballots for respondent. I do not think we are justified in acting upon such a supposition. It does not appear, even indirectly, that respondent took a single exception to any ballot counted for appellant, and it is only indirectly shown that he excepted to the rejection of any of the 683 ballots counted for him by the election board. These exceptions are not contained in the record, and cannot be presumed to have possessed any merit; but conceding every one of them to have been well taken, they were not sufficient in number to alter the result. The opinion of the Department holds—and in so holding is sustained by both reason and authority—that proper practice required all exceptions of both parties to be included in the record, in order that this court might give a final judgment in favor of the party entitled to the office. It appears that the appellant was desirous of having the record so made up, but that

the respondent made no effort to have his exceptions included, and while it is true that the trial judge in settling the bill of exceptions erroneously held that the respondent was not entitled to have his exceptions appear, it is also true that the law gave him a summary and effective remedy to compel their allowance; and the fact that he made no attempt to avail himself of that remedy deprives him of the right to ask this court to indulge the surmise that he may have had exceptions to ballots counted for appellant sufficient to overcome the plurality which appellant appears to have received.

The cases cited in the Department opinion to show that the practice of this court has been to remand election contests for new trial upon reversal of the judgment of the superior court, do not sustain that disposition of the present case. In the cases cited, this court could not have given final judgment in favor of appellants without making affirmative findings of fact that had not been made by the trial courts. In this case the fact is found, that appellant received 23,132 legal votes, and the finding that respondent received 23,335 legal votes is simply held to be unsustainable, to the extent of some 1,400 votes, by any evidence. To make the proper deduction in such case for want of evidence, is not to make a finding, and the deduction being made, the appellant appears to be clearly entitled to a final judgment on the findings. This being so, such a judgment alone is a proper one, and more especially in an election contest, where the result of ordering a new trial must inevitably be that the term to which the appellant appears to have been chosen will have expired long before a new trial can be had.

For these reasons I dissent from the order of the court denying a modification of the judgment.

[S. F. No. 1895. Department One.—September 13, 1901.]

IVAN TREADWELL, Appellant, v. JAMES P. TREADWELL et al., Respondents.

PARTITION—COMPENSATION OF REFEREES—DISCRETION—APPEAL.—In an action for partition, the trial court has a wide discretion in determining the amount of compensation which ought to be paid to the referees for their services; and where the record upon appeal does not disclose that such discretion was abused, the compensation fixed will not be disturbed, and the judgment will be affirmed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

William Matthews, for Appellant.

A. A. Sanderson, for Respondents.

GAROUTTE, J.—This appeal is prosecuted from a judgment which allows three referees, in the matter of the partition of certain lands, five thousand dollars each, as compensation for services rendered. It is claimed that the compensation allowed is too great.

The lands to be partitioned consisted of seventeen separate tracts, situated in the city and county of San Francisco, of the value of about eight hundred thousand dollars. These referees testified that about one year was occupied in doing the work, and that their services were reasonably worth seven thousand five hundred dollars each. There was some evidence offered by appellant which conflicted with that of the referees. But it cannot be said to even preponderate against them. In a case of this character, as in fixing the amount of an attorney's fee, the trial court is allowed a wide discretion, and upon appeal a plain abuse of that discretion must appear, or the judgment will be affirmed. This is settled law. (*Freese v. Pennie*, 110 Cal. 467; *Estate of Byrne*, 122 Cal. 260.) By the record it is not disclosed that the trial court, in the rendition of its judgment, abused the discretion vested in it, and for that reason the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

[Crim. No. 760. Department One.—September 17, 1901.]

THE PEOPLE, Respondent, v. MIGUEL FIGUEROA, Appellant.

CRIMINAL LAW—SETTING ASIDE INFORMATION—PRELIMINARY EXAMINATION—TIME TO PROCURE COUNSEL—PRESUMPTION.—An information will not be set aside for refusal of the magistrate conducting the preliminary examination to grant the defendant further time in which to procure counsel, where it appears that he had been granted one week in which to procure counsel and prepare for the hearing. In the absence of evidence to the contrary, it will be presumed that he was duly informed by the magistrate of his right to the aid of counsel in every stage of the proceeding.

ID.—RAPE—EVIDENCE—USE OF DIAGRAM.—Upon the trial of a defendant accused of rape, it was not objectionable for the prosecuting attorney to draw upon a blackboard a diagram of the scene of the crime and its surroundings, and to prove by a witness familiar with the locality that it was a substantially correct representation thereof, and to use it in the examination of the witness, in the usual way, asking him to state the distances between the objects indicated thereon.

ID.—CONDITION OF PERSON AND CLOTHING OF CHILD—BEST EVIDENCE.—The mother of a child six years old, charged to have been outraged by the defendant, was entitled, after testifying that within a few minutes after the commission of the crime she inspected the child's person and clothing, to describe their condition. The condition of the clothes at the time of the trial, even if left unwashed, were not the best evidence, or any evidence, of their condition immediately after the outrage.

ID.—COMPLAINT OF CHILD INCOMPETENT TO TESTIFY.—The general rule that evidence of the complaints of the prosecuting witness, in cases of rape, are only admissible as corroborative of her testimony, does not apply to complaints made by a child six years of age, who is incompetent to testify. In such case, the fact of immediate complaint by the child is admissible, as tending to show her physical condition at that time, though any narrative of what the child said is inadmissible.

ID.—ABSENCE OF EXPERT MEDICAL WITNESS—FAILURE OF SHERIFF TO SERVE SUBPOENA.—The mere absence of a physician desired by the defendant as an expert witness, owing to the failure of the sheriff to serve a subpoena upon him, is not ground for reversal of the judgment of conviction, where no other effort appears to have been made to have the subpoena served by some other person, and no continuance was asked until the attendance of a physician could be procured.

Id.—REBUTTAL—CONTRADICTION OF WITNESS AS TO CONVERSATION.—

It was proper for the parents of the injured child to testify in rebuttal in contradiction of a witness who testified concerning a conversation between them, about which they were not examined in chief, but which was inconsistent with their original testimony.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion.

Hugh J. & William Crawford, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

GRAY, C.—The defendant appeals from a judgment convicting him of rape, committed on the body of a child six years of age, and from an order denying him a new trial. The points made by appellant, so far as they are deemed material, will be considered in the order in which they appear in appellant's brief.

1. In the absence of a showing to the contrary, it will be presumed that the magistrate before whom the defendant was first brought after his arrest duly informed him of "his right to the aid of counsel in every stage of the proceedings." It appears that defendant was first arraigned in the justice's court on July 3, 1900, and that his examination was then set for the tenth day of the same month. This gave him a week to prepare for the hearing; he failed, however, to procure counsel, and no attorney appeared for him at the preliminary examination. On said July 10th, the defendant requested the further postponement of the examination, that he might have further time to procure an attorney. The magistrate denied the request. All this was urged before the superior court as a reason for granting the defendant's motion to set aside the information.

We think the motion to set aside the information was properly denied. Seven days was a reasonable time in which to obtain an attorney, and the defendant not having procured one in that time, and apparently having no means, the outlook for his ever being able to get an attorney to represent him at the preliminary examination was, to say the least, discouraging. The defendant was not deprived of his right to counsel by the action of the magistrate, and was given

ample time to avail himself of that right. (*People v. Flannelly*, 128 Cal. 83.)

2. It would serve no useful purpose to set out the evidence herein, or to discuss its sufficiency at any length; we deem it sufficient to say that we have carefully examined the same, and find it ample, even under the most extreme view that could be taken as to the acts necessary to constitute rape, to support the verdict of conviction.

3. The prosecuting attorney drew a diagram of the scene of the crime and its surroundings on a blackboard, in the presence of the jury, and after explaining it, in their hearing, to a witness familiar with the locality portrayed, asked the witness if it was a "substantially correct diagram of the locality and the points of which it purports to be a representation"; to which the witness replied, "Yes, sir." The counsel then made use of the diagram in the examination of the witness, in the usual way, pointing to it, and asking the distances between various objects thereon indicated. There can be no valid objection to the method thus pursued by counsel in the examination of a witness, and the court very properly overruled the objections that were made to it by defendant's attorney.

4. Within a very few minutes after the commission of the crime the mother of the outraged child inspected her person and clothing, and at the trial the mother described their condition. Defendant moved to strike out the description of the condition of the clothes, on the sole ground that it was not the best evidence. This was the best evidence that could have been produced at the trial as to the condition of the clothes immediately after the child was injured, and their condition at that time was an important fact that the prosecution had the undoubted right to show. The clothes themselves placed in evidence at the trial, even if they had been left unwashed, would not have been the best evidence, or any evidence, standing alone, of their condition immediately after the outrage.

5. The mother was asked, concerning her child, the following question: "Now, when you got here to the house, did she make any complaint about what had happened to her?" This question, and similar questions asked of two other witnesses, were permitted, against the objection of the defendant, to be answered, and the witnesses replied in each instance, in substance, that she did, but nothing further was

stated as to what she said. The child herself was called as a witness, but, after inquiry, the court held that she was "too young, entirely, to administer an oath to," and therefore she did not testify.

It is now argued by appellant that evidence as to the complaints of an outraged woman is admitted only as corroborating or sustaining her testimony, and that when she does not appear as a witness, even the fact that she made complaint, however recently after the injury, is not admissible. Many authorities are cited to sustain this position, but on examination they are found to relate, for the most part, to adults who were competent to testify, but were for some reason absent. The few authorities that relate to children incompetent to testify, and other incompetents, seem to go no further than to exclude their declarations as to what occurred, leaving out the question as to whether the fact that complaint was made by them may be shown. We think that the evidence that the child complained to her mother so soon after the injury is admissible, for the same reason that the fact of her crying was admissible. Taken in connection with her extreme youth, and the fact that she doubtless possessed no understanding of the sexual act, the fact of her complaining tended to show that she had been hurt and injured. If she had not been hurt, not understanding the defendant's conduct, she probably would not have made any complaint. The fact of her complaining after the criminal act was accomplished, and after the defendant had fled, is perhaps not admissible as a part of "the *res gestae* of the crime," as that expression is usually understood and applied, but it may be treated rather as tending to show her physical condition at the time of the utterance of the complaint, just as groans or other evidences of pain and suffering are received in evidence to illustrate the condition when that condition is the subject of inquiry. Of course, any narrative of the child as to what the defendant did would not be admissible. In *People v. Barney*, 114 Cal. 554, the child assaulted was permitted to testify, but her testimony was subsequently stricken out, and the jury instructed to "totally disregard it," and yet it was held not error to permit the mother of the child to testify that "shortly after the date of the alleged offense" the child made complaint to her about the injuries she had received from the defendant. We think this decision correct on principle, and it seems to support the position we here take. The case of *People v. Graham*, 21 Cal. 261, is not out of line

with this case, for the reason that the substance of the child's statement appears in that case to have been given. The court says: "The decision of the court that the witness might testify to the statements made by the child as to the occurrences, and with regard to which the child had not testified, was erroneous." And again, in the same case: "It is impossible not to see that the effect of this answer, taken in connection with the immediately preceding testimony of the witness, was the same as if the witness had detailed what the child said."

6. That no physician was in attendance at the trial seems to have been due to the fact that no subpoena was served on one. The sheriff was not the only party that could serve a subpoena, and he having neglected to make service, the defendant, if he desired the presence of a physician at the trial, should have requested a continuance until he could procure the attendance of such physician as he might have subsequently subpoenaed. Not having done this, he has nothing to complain of.

7. On behalf of the defense, a witness named Cline testified that he went home with Aseltine, the father of the injured girl, after an ineffectual attempt had been made to take and keep the defendant in custody, on the same day of the alleged crime, and that he heard a conversation between Mr. and Mrs. Aseltine, in which the latter said she met her daughter coming out of the brush, and did not see defendant with her; that the husband asked if the child was hurt, and the wife replied that she did not think she was. In rebuttal, Aseltine and his wife were called by the prosecution, and against the objection of defendant that it was not proper rebuttal, and that they had testified before as to the matter, they were permitted to contradict the foregoing statements of Cline. We have examined their former testimony, and cannot find where they were then asked anything as to whether they made the specific declarations testified to by Cline. Of course, it was proper rebuttal for them to contradict Cline as to these declarations, for they conflicted with their original testimony.

We find no error in the record and advise that the judgment and order be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1868. Department One.—September 21, 1901.]

CARL DIEHL, Respondent, v. JOHN D. ROBERTS, Appellant.

NEGLIGENCE—LAW OF THE ROAD—COLLISION OF HACK WITH BICYCLE—LIABILITY OF EMPLOYER.—It is the duty of the driver of a hack, which has been traveling upon a street-car line, upon meeting a street-car, to turn to the right, if possible, so as to avoid collision with other travelers, going in the opposite direction; and where he negligently turned to the left, and collided with a bicycle-rider, who was riding on the proper side of the street, the employer of the hack-driver is liable for the resulting injury to the bicycle-rider.

ID.—EMPLOYMENT OF HACK-DRIVER—SUFFICIENCY OF EVIDENCE.—Evidence showing that the hack was owned by the defendant, that he received the profits earned by it, and that the driver lived at his house, and worked for him in other capacities, taken in connection with evidence of admissions made by the defendant, is sufficient to show the employment of the hack-driver by the defendant.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. A. S. Kittredge, Judge.

The facts are stated in the opinion of the court.

William A. Bowden, and Edward E. Cothran, for Appellant.

D. W. Burchard, for Respondent.

GAROUTTE, J.—Plaintiff has recovered judgment in an action for damages for personal injuries, and defendant appeals. The facts are these: "Plaintiff was riding, at night, upon a bicycle, westwardly, upon the right-hand side of the main road. A street-car in the center of the road was traveling in the same direction. Plaintiff was six feet to the right of the car, and about twenty or thirty feet to the rear thereof. A hack was being driven in the opposite direction, upon the car-track. Before meeting the car, the driver turned aside to the left, and immediately a collision with the bicycle-rider occurred. Upon this state of facts the jury was justified in holding the defendant guilty of negligence. He attempts to absolve himself from the charge of negligence by invoking the provisions of section 2931 of the Political Code, which read: "When vehicles meet, the drivers of each must turn

seasonably to the right of the center of the highway, so as to pass without interference, under a penalty of twenty-five dollars for every neglect, to be recovered by the party injured . . . But this section does not apply to vehicles meeting cars running on rails or grooved tracks." If the facts of this case showed a collision between the hack and the street-car, then defendant might find relief in the provisions of this section, but that is not the present case. Here we have the plaintiff traveling upon the road, exactly where he was entitled to travel, and as to him, the driver of the hack should have been upon the other side of the road. The trial court finds as a fact that the driver could have turned to the right upon meeting the car. If he could have done so, he certainly should have done so, as far as the rights of travelers upon the road, other than those riding upon street-cars, were concerned.

It is next insisted that the driver of the hack was not in the employ of defendant at the time the injury occurred. The evidence upon this point is somewhat circumstantial. At the same time, it shows that the hack was owned by defendant; that he received the profits earned by it; that this driver lived at his house, and at the time was working for him in other capacities. Taking these things into consideration, in connection with admissions of defendant testified to my witnesses, the court cannot say the evidence is too weak in this particular to support the verdict.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[L. A. No. 897. Department Two.—September 23, 1901.]

SECURITY LOAN AND TRUST COMPANY, etc., Respondent, v. FRANCISCO ESTUDILLO et al., Appellants.

FORECLOSURE OF MORTGAGE—STIPULATION FOR DEFAULT JUDGMENT—AUTHORITY OF ATTORNEY—PRESUMPTION.—Where it appears that an attorney for the defendant in an action to foreclose a mortgage was employed to secure delay, and after securing all the delay practicable, waived further right to answer, and stipulated for a default judgment, it must be presumed that such stipulation was within the scope of his authority.

ID.—REFUSAL TO SET ASIDE DEFAULT—PRESUMPTION UPON APPEAL—CONFLICTING EVIDENCE.—Upon appeal from an order refusing to set aside the judgment by default, all presumptions are in favor of the order, and where the evidence was conflicting as to the authority of the attorney to stipulate for the judgment, the order must be affirmed.

ID.—AFFIDAVITS OF PLAINTIFF—IMMATERIAL AFFIDAVIT OF MERITS.—Affidavits for the plaintiff were properly read on the motion to set aside the default, for the purpose of showing that the default should not be opened. If the stipulation for the default was authorized as found by the court, the defendant's affidavit of merits was immaterial.

ID.—EVIDENCE OF AUTHORITY—TESTIMONY OF ATTORNEY—PRIVILEGED COMMUNICATION.—The testimony of the attorney was admissible to show his authority to stipulate for the default. His employment was not a "privileged communication," within the meaning of the statute.

APPEAL from an order of the Superior Court of Riverside County refusing to vacate a judgment by default. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

J. F. Conroy, for Appellants.

R. H. F. Variel, for Respondent.

THE COURT.—Appeal from order denying motion to set aside default and vacate judgment and decree of foreclosure.

In May, 1892, the plaintiff loaned to defendants \$12,675, for which defendants gave their notes secured by mortgage. In May, 1898, the plaintiff became dissatisfied with the loan, as a

large amount of interest had accumulated and remained unpaid. Defendants then employed Wilfred M. Peck as their attorney, and a series of negotiations in regard to proposed settlements followed, necessitating delays. The matters were not settled, and finally, in October, 1898, plaintiff began an action to foreclose the mortgage, and the summons was duly served upon defendants. The amount then due was over seventeen thousand dollars.

Upon the application of defendants' attorney, various delays and extensions were granted. Finally, defendants filed a demurrer to the complaint.

On December 20, 1898, plaintiff became desirous of proceeding with the foreclosure, and after so notifying defendants' attorneys, the following stipulation was entered into:—

"It is stipulated by and between the plaintiff in the above-entitled action, on the one hand, and the defendants, Francisco Estudillo and Felicitas Estudillo, on the other, by their respective counsel duly authorized thereto, that the demurrer of the said-defendants to the plaintiff's complaint, heretofore filed in said action, may be forthwith overruled by the above-entitled court, and that said defendants may have twenty days' time *from this date* within which to file and serve their answer in said action.

"Dated December 20, 1898.

R. H. F. VARIEL,

"Attorney for Plaintiff.

"WILFRED M. PECK,

"Attorney for Francisco Estudillo and Felicitas Estudillo."

Defendants' attorney agreed that he would have a minute order entered upon the above stipulation overruling the demurrer, but by oversight, or otherwise, neglected to do so. Plaintiff's attorney became ill for several weeks, and further delays resulted. Negotiations were resumed, and the attorney for defendants desired to secure from plaintiff an agreement to waive a deficiency judgment. The plaintiff refused to make such agreement or to give further time. Thereupon, on the stipulation of December 20, 1898, and on February 8, 1899, a minute order was entered, of which the following is a copy: "In accordance with the stipulation filed herein by counsel for plaintiff and defendants, it is hereby ordered that the demurrer of Francisco Estudillo and Felicitas Estudillo be overruled and twenty days given to answer."

On February 21, 1899, after some conversation about the various delays, the attorney for defendants, at the request of plaintiff's attorneys, entered into a stipulation, the material part of which is as follows:

"That said defendants waive the service of notice of overruling of said demurrer, and further waive the right to and refuse to further appear or answer in said action, and that the plaintiff shall be entitled to take judgment in accordance with the prayer of its complaint, or as may otherwise be ordered by the court on the hearing of said cause.

"Dated February 21, 1899.

R. H. F. VARIEL,

"Attorney for Plaintiff.

"WILFRED M. PECK,

"Attorney for said Defendants."

Upon the above stipulation, default was entered and a judgment and decree of foreclosure duly made. Defendants contend that their attorney was not authorized to make the above stipulation; that he was retained to defend the case on its merits, and had no authority to consent to a default against them. The affidavits and evidence on this question were conflicting, but there is evidence which, if true, shows that defendants had retained the attorney for the purpose of securing all the delay possible, and that their attorney had authority to make the stipulation.

The attorney testified that he was employed long before the suit was brought for the purpose of gaining all the time he could for defendants; that in pursuance of his employment he procured various extensions of time before suit was brought, and after suit he procured further time; that defendant Francisco was with him on all occasions, except one, when these extensions were procured; that on August 1, 1898, when the last extension of time was granted, prior to bringing suit, in the office of plaintiff's attorney, it was agreed by defendant Francisco that in case he failed to pay the plaintiff at the time named in the extension, he would make no delay and would interpose no defense; that after suit was brought he put in a demurrer, but told defendant Francisco that according to agreement he would consent to have it overruled.

The affidavit of plaintiff's attorney sets forth fully the letters and correspondence with regard to time, and states that finally, on September 20, 1898, when again asked for time, it

was stated by defendant and his attorney that one Wolfskill had conditionally promised defendants a loan, and time was wanted for Wolfskill to examine the property; that it was agreed by defendants' attorney, in the presence of defendant Francisco, that if Wolfskill should not make the loan after investigation, that defendants "would not appear or demur in said action, or cause any delay in connection with the foreclosure proceedings."

In a letter written by plaintiff's attorney to defendant's attorney, dated October 6, 1898, the various delays and extensions of time are referred to, and this language is used; "These various extensions of time have been given in deference to Mr. Estudillo, to obviate any necessity on his part of endeavoring, through unnecessary objections, to delay the foreclosure proceedings. Of course I did not take any written stipulation from you or from Mr. Estudillo. It was not considered necessary, but it was to my mind, and it was to Mr. Bartlett's mind, one of the expressed conditions under which these various extensions were made, that in the event Mr. Estudillo could not make some satisfactory arrangement, then we were to be allowed to proceed unobstructedly with the foreclosure proceedings. We gave him every extension requested, either by him, by his brother, or by you, and until each and all of you admitted that every hope of effecting a replacement of the loan or a sale of the property had been exhausted. Under all the circumstances, therefore, permit me to express it to you plainly, that, in my judgment, Mr. Estudillo is not justified in any manner in intervening in the case to procure delay."

In a letter from defendants' attorney in reply to the above, dated October 11, 1898, after reference to the delays and extensions, it is said: "I certainly had and have no intention of violating any pledges made to either you or Mr. Bartlett, though I hardly think my statements to either of you were quite as strong as you and Mr. Bartlett put them. Be that as it may, I shall ask for no extension of time, nor will I put in any demurrer or answer for time."

We think the above evidence, and other circumstances not necessary to be here inserted, sufficient to sustain the order made by the court. An attorney is an officer of the court, and the presumption is that he acted within the scope of his employment. All presumptions are in favor of the order of the

lower court. If there is evidence sufficient to justify the order, we must affirm it.

There was no error in permitting the affidavits of plaintiff to be read. The court did not admit them for the purpose of contradicting the defendants' affidavit of merits, but for the purpose of determining as to whether or not the default should be opened. If the stipulation was authorized, the default was properly entered, regardless of the question of merits. Nor was it error to allow the defendants' attorney to testify as to his authority to enter into the stipulation. Defendants denied that any such authority was ever given. The attorney was the principal witness as to his authority and the purposes for which he was employed. The employment was not a "privileged communication," within the meaning of the statute.

The order is affirmed.

Hearing in Bank denied.

[Sac. No. 751. Department Two.—September 23, 1901.]

STELLA M. STILES, Respondent, v. HARRY L. CAIN,
Appellant.

SPECIFIC PERFORMANCE—PLEADING—INSUFFICIENT COMPLAINT—ADEQUATE CONSIDERATION—FAIRNESS.—A complaint for the specific performance of a contract to convey land must state facts showing that it is based upon an adequate consideration, and is, as to the defendant, fair and just; and if it fails to do so, it is error to overrule a general demurrer thereto.

ID.—CONTRACT BETWEEN HUSBAND AND WIFE—UNDUE INFLUENCE NOT PRESUMED.—A contract entered into between husband and wife is not presumed to have been obtained by undue influence on the part of the wife; though, in seeking specifically to enforce the contract, she must allege and prove facts showing its fairness and adequacy.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

Goodwin & Goodwin, for Appellant.

N. J. Barry, for Respondent.

TEMPLE, J.—This is an action for specific performance. The plaintiff had judgment, and defendant appealed therefrom within sixty days after its rendition, and the evidence was preserved in a bill of exceptions. The parties were husband and wife when the contract involved in the case was entered into, but have since been divorced, and the plaintiff has assumed her maiden name. A general demurrer for want of facts was interposed to the complaint, which was overruled.

The complaint shows that the parties entered into an agreement, which is set out at length, and that plaintiff has fully performed on her part; that defendant has paid her the sum of money agreed upon, and conveyed to her a portion of the property, but refused, and still does refuse, to convey to her a strip thirty feet wide upon which the barn is partly situate. She avers that damages would not afford an adequate remedy, and therefore asks for specific performance.

The complaint contains no allegations to the effect that there was any consideration for the contract, except by the averment that it was in writing, which fact, under our code, imports a consideration. Nor are any of the circumstances under which the contract was entered into shown, otherwise than by the recitals found in the written contract. These cannot be regarded as averments of the pleader, at all events, beyond the covenants found in it, of which specific performance is asked.

The first point made against the complaint is, that it does not show facts which would entitle plaintiff to the equitable relief of specific performance. It does not, it is said, aver that the contract which plaintiff desires to enforce was founded upon an adequate consideration, and was in all respects fair and just as to defendant, as required by section 3391 of the Civil Code. As said in *Bruck v. Tucker*, 42 Cal. 346, in an application to a court of equity for such relief, it is not enough that the contract is valid, or "that it is free from fraud or from such a degree of imposition or surprise upon the defendant as would support an application on his part to set it aside entirely—these and the like circumstances, though ordinarily indispensable, are yet far from sufficient in themselves, as constituting a case invoking the relief—extraordinary in its character—sometimes administered by the courts through the instrumentality of a decree for specific performance."

There are, then, contracts which are perfectly valid, and which a court of equity would not set aside for fraud, mis-

take, or for any unfairness, but which, nevertheless, are so unfair that specific performance will not be decreed. This has always been the rule with courts of equity. They will not aid in the enforcement of a harsh and unjust contract, even though it be valid. The case cited also holds that the party seeking such relief must show, both by averment and proof, that the contract is, as to the defendant, fair and just. That the evidence must show such a case cannot be doubted, and this case distinctly holds that what must be proven on that subject must also be averred. This does not mean that it must be alleged *in haec verba* that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient, but the fact that the contract is such as will satisfy the conscience of the chancellor, in the respects mentioned, must appear from a proper statement of facts.

The rule has been frequently affirmed since, as in *Nicholson v. Tarpey*, 70 Cal. 608, *Morrill v. Everson*, 77 Cal. 114, and in the very recent cases of *Windsor v. Miner*, 124 Cal. 492, and *Prince v. Lamb*, 128 Cal. 120.

It is also contended that the complaint is defective because it does not show that the contract was founded upon an adequate consideration, and was not obtained through undue influence, inasmuch as the parties to it were husband and wife. A quotation is made from *White v. Warren*, 120 Cal. 323, giving what was said to be the effect of sections 158 and 2235 of the Civil Code, as applied to husband and wife: "All transactions between the husband and wife, by which one obtains an advantage over the other, are presumed to be entered into by the latter without consideration, and under undue influence." Several opinions were rendered in that case, and it may be doubted whether the above statement of the law received the sanction of a majority of the court.

Certainly, another proposition contained in that opinion, upon which this, in part, depended, did not receive the approval of the court—that is, that the trustee obtains an "advantage," within the meaning of section 2235 of the Civil Code, only when he gets the best of the trade. This construction would partially repeal the section, the main effect of which is to put the burden of proof upon the trustee to show the propriety of his conduct in all transactions with his beneficiary. The rule is older than the code, and is, that

such a contract, without any *proof* of unfairness, is voidable, at the option of the beneficiary, but "it is possible for the trustee to overcome the presumption of invalidity." (2 Pomeroy's Equity Jurisprudence, sec. 958.) The rule which was codified declared the presumption to be, that the trustee got the best in every transaction with his beneficiary, and did not give an adequate consideration for what he got. To say that the beneficiary must prove that the consideration was inadequate, is to reverse this time-honored rule.

These two sections of the code were discussed in *Dimond v. Sanderson*, 103 Cal. 97, and again in *Tillaux v. Tillaux*, 115 Cal. 663. The general conclusion reached in these cases accords with my views, although I would reach the end in a slightly different way.

Section 158 of the Civil Code authorizes husband and wife to enter into any transaction with each other, "subject to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title of trusts." The most important provision on this subject found in the chapter on trusts is found in section 2235 of the Civil Code, which reads: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

It will be seen that the presumption of unfairness is against the trustee, and in favor of the beneficiary. The beneficiary may get an advantage from the trustee. If the transaction is a fair one, each would get an advantage from the other. The presumption could not be in favor of and against each at the same time, that he obtained his advantage without sufficient consideration, and by the use of undue influence. These conflicting presumptions are just as impossible in the case of husband and wife. Neither husband nor wife is a technical trustee of the other in respect to the subject of these transactions, but the section is to be construed as all laws should be, with reference to conditions and circumstances. By our statutes, so great a change has been made in the property rights of a wife, from those formerly existing, that it may be said that she is thereby, with reference to her separate property, emancipated from the control of her husband. This emancipation from a control

which was previously quite complete was largely accomplished by section 158 of the Civil Code. But in giving her the right freely to contract in regard to property with her husband, the legislature naturally sought to give her some protection from the influence of her husband. The right to control her own affairs would not free her from what usually in fact is, and is always presumed to be, the predominating influence of her husband. At common law she could enter into no contract, and her husband could not convey property to her, but only to a trustee for her benefit. Her civil existence was merged in that of her husband. She could not be held responsible for a common assault committed in his presence, but he would be liable for such acts on her part. In fact, the entire framework of the law in regard to the property rights of married women rested upon the assumption of the dominion of the husband over the wife. This section was a change in that system, in favor of the wife, and the protection here furnished is to her.

I do not contend that there is no legal presumption that the wife has great influence over her husband. Such presumption does exist, and may be an important factor in any litigation between them. The question is, whether this influence is presumed to be "undue influence," within the meaning of section 1575 of the Civil Code, without proof of the fact, in case she has a business transaction with her husband. I think not, and such, I think, is the effect of the two cases I have cited above.

In this case, as already stated, the circumstances are not shown, save by the recitals in the contract. If we can regard those, it appears that the wife had brought suit against her husband to recover two promissory notes of the alleged value of four thousand dollars, and had, besides, sued him for a divorce. By the agreement, she relinquished her claim to the notes, and promised to dismiss her action for a divorce "on the merits." She avers that he paid her the money and conveyed a portion of the homestead to her, and refused to convey the balance.

Assuming that these matters may be considered, they show that the wife was not then under the predominating influence of her husband, and that the consideration for the agreement *may*, in part, have been to compose a matrimonial dispute. So far as it was, that would not be capable of pe-

cuniary estimation. But there is nothing to show that the contract was fair and just as to the defendant. Upon this proposition the construction of section 158 of the Civil Code has no bearing, while the recited facts suggest the possibility of unfairness. She could have shown in her complaint that she made claim to the notes in good faith, and was not founding her claim upon violated confidence reposed in her by her husband, as was the case in *Brison v. Brison*, 90 Cal. 323.

So, too, in regard to the action for a divorce. She could have shown that it was not brought for the purpose, and was not used to extort a harsh and unreasonable settlement from the defendant. That such an action *could* be so used under some circumstances is obvious. For instance, charges might be made, in some cases, which the defendant would make great sacrifice to avoid a trial of.

A reversal will necessitate a reconstruction of the pleadings, if the case is carried further, and some other points made need not be noticed.

Judgment reversed and cause remanded for a new trial.

McFarland, J., and Henshaw, J., concurred.

[Sac. No. 748. Department Two.—September 23, 1901.]

J. W. RELLEY, Respondent, v. PATRICK CAMPBELL
et al., Appellants.

MORTGAGE BY CORPORATION—UNAUTHORIZED EXECUTION—SPECIAL MEETING OF DIRECTORS—WANT OF NOTICE.—The execution of a mortgage in the name of a corporation, upon property belonging thereto, cannot be authorized at a special meeting of the directors, at which all of them were not present, and of which no notice was given.

ID.—FORECLOSURE—ESTOPPEL—REPRESENTATIONS BY MANAGER—OWNERSHIP OF PROPERTY AND STOCK—EVIDENCE.—Upon foreclosure of such unauthorized mortgage, in order to justify evidence against the corporation of an estoppel based upon representations as to its regularity and validity, made by one who was the acting president, manager, and treasurer of the corporation, and who joined individually in the execution of the mortgage, and was claimed by the mortgagee to be the sole owner of the corporate property and stock, it must be proved that he was the sole owner

of the stock. Until such proof was given, the corporation must be treated as a separate entity, as to which such representations were not competent evidence.

APPEAL from a judgment of the Superior Court of Nevada County and from an order denying a new trial. F. T. Nilon, Judge.

The facts are stated in the opinion of the court.

Charles W. Kitts, and Sumner T. Dibble, for Appellants.

Thomas S. Ford, P. F. Simonds, and W. H. Carlin, for Respondent.

TEMPLE, J.—This is an action to foreclose a mortgage upon mining property. The mortgage, on its face, purports to have been given by Patrick Campbell and the New Blue Point Mining Company, a corporation. In form, the complaint attempts to state two causes of action,—in reality, but one. It contains averments proper in a complaint for foreclosure, with statements tending to show that in fact the corporation is, as to the property involved, but another name for Patrick Campbell, and that he made representations designed to convince plaintiff that the mortgage was regularly executed by the corporation and would bind it, and that in reliance upon these representations, plaintiff accepted the mortgage and loaned the money. And it is contended, that since Campbell was the sole owner of the property and of the corporate stock, he and his corporate double should be estopped to deny the validity of the mortgage. It is also alleged that the property of the corporation had the benefit of the money loaned by plaintiff to Campbell. All this was in anticipation of the objection that the mortgage was so executed as not to bind the corporation.

An action might be sustained upon such a theory, if there was evidence to support it. The evidence here consists of statements made by Patrick Campbell to plaintiff and others. Campbell was, at the time the statements were made, acting president of the corporation, its manager and treasurer, and, as such, in possession of the property,—that is, this was so, if it can be said that the corporation was in control of the property. Campbell had been in sole possession for years before the corporation was formed, and its formation made no apparent change in his relation to it. But even so, these assertions were not competent evidence as against the corporation, which must be treated as a sep-

arate entity until it was proven that Campbell was the sole owner of the corporate stock. It came in under objection, and after plaintiff had closed his evidence,—there being no evidence to show that Campbell was sole owner of the stock,—a motion was made to strike it out. The motion was denied and an exception taken. The ruling was clearly erroneous.

The trouble with the execution of the mortgage by the corporation was, that what was done in that matter was at a special meeting, and all the directors were not present. No notice of the meeting had been given to any of the directors. The corporation had no by-laws. No provision was made for meetings, and it had no office or place for such meetings. Although it had existed for several years, there had been only one previous meeting since its organization, and that was also to authorize a mortgage to plaintiff to secure money loaned by him to Patrick Campbell. The meeting was not called, nor was the notice given as provided in section 320 of the Civil Code, nor was there proof of any kind that notice had been given. The minutes do not show that notice was given.

There are many other alleged errors, which it is not necessary to notice; such as, it is objected that the book offered as that kept by the corporation was not shown to be such, and that it was not made to appear that the mortgage was authorized by two thirds of the stockholders. Upon another trial these objections may be obviated.

No objection is made to the judgment against Patrick Campbell, and as to him the judgment and order are affirmed. As to the corporation, the judgment is reversed and the cause is remanded for a new trial.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

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[S. F. No. 2808. In Bank.—September 23, 1901.]

JEDEDIAH T. HOYT, Respondent, v. JULIET H. STARK, Appellant.

APPEAL—DISMISSAL—FAILURE TO FILE UNDERTAKING IN TIME.—An appeal will be dismissed for failure actually to file the undertaking on appeal in the county clerk's office within five days after service of the notice of appeal.

ID.—INSUFFICIENT FILING—DELIVERY OUT OF CLERK'S OFFICE.—The delivery of the undertaking to a deputy clerk, at a place other than the clerk's office, after office hours, on the last day for filing, which he then marked as filed as of that day, but which did not reach the clerk's office and was not entered as filed until the following day, was not sufficiently filed to sustain the appeal.

ID.—RIGHT AND DUTY OF ADVERSE PARTY—WATCHING OF CLERK'S OFFICE.—It is the duty of the adverse party to watch the clerk's office not more than five days for the undertaking, to the sufficiency of the sureties upon which he has a limited time in which to object. But if the undertaking has not reached the clerk's office within five days after service of the notice of appeal, the adverse party has no further duty to perform.

ID.—PRESENTATION AT CLERK'S OFFICE FOR FILING—NEGLECT OF MINISTERIAL DUTY.—The presentation of the undertaking for filing at the clerk's office within proper time is essential. If this is done, the neglect of the ministerial duty of the clerk to enter the filing cannot prejudice the appellant. But where the appellant does not comply with the law on his part, and delivers the undertaking out of the clerk's office, the neglect of the deputy, who has received it and marked it filed, to enter it in the clerk's office on the same day, cannot relieve the appellant.

ID.—FRACTION OF DAY, WHEN DISREGARDED.—If the appellant had procured the deputy to accompany him to the clerk's office after office hours, and had there presented the undertaking for filing, the fraction of the day would, in such case, be disregarded.

MOTION to dismiss an appeal from an order of the Superior Court of Santa Clara County to sell an appraised excess of homestead value under execution. W. H. Lorigan, Judge.

The facts are stated in the opinion of the court.

A. H. Jarman, for Appellant.

Charles W. Davison, and J. H. Russell, for Respondent.

HENSHAW, J.—This is a motion to dismiss an appeal. The uncontroverted facts are the following: The office of the county clerk of Santa Clara County opens at nine, A. M., and closes at five, P. M. After the hour of five, P. M., appellant's attorney went to the office of the county clerk to file his undertaking upon appeal. It was the last day allowed him by law for this purpose. Finding the office closed, he went to a social club in the city of San Jose, where he found one of the deputy county clerks. To him he explained the circumstances. The deputy took the undertaking and indorsed it as filed upon that day and date. At 9:30, A. M., upon the following day, respondent's attorney visited the clerk's office, examined the proper books and registers, and found no record of the filing in the clerk's office of the necessary undertaking. Thereafter the deputy county clerk to whom had been intrusted the undertaking, arriving at the office, delivered the bond to a fellow-deputy, who placed it in its proper receptacle and made in the proper books the entry of its filing.

The single question thus presented is, whether, under section 940 of the Code of Civil Procedure, the undertaking was filed in time. That section, in terms, requires a filing "with the clerk of the court in which the judgment or order appealed from is entered." It is necessary for the appealing party so to file within five days after the service of his notice of appeal. The adverse party thereafter has a limited time within which to except to the sufficiency of the undertaking, and to call upon the sureties to justify. The undertaking may be filed at any time within the five days, but may not be filed thereafter. Respondent's time for objection begins to run, not from the expiration of the five days, but from the time of actual filing, which may be upon any day within the five days. No actual notice is required to be given to the respondent's attorney. It becomes his duty, therefore, to watch the office, and learn from an inspection of the proper records whether the undertaking has been filed. But if no such undertaking shall have been filed at the expiration of the five days, his duty in this regard is at an end. "It is clearly intended that the adverse party shall not be compelled to watch the clerk's office for the filing of an undertaking more than five days after he has notice of the filing of the notice of appeal. (*Boyd v. Burrell*, 60 Cal. 280.) As the only method by which the adverse party can acquire his

knowledge is from an inspection of the proper records of the county clerk's office, it would seem inevitably to follow that the meaning of the law is, that the appealing party shall offer for filing to the clerk, at his office, the requisite undertaking within due time. If he shall do this, under the familiar principle that private rights will not be impaired by the failure of public ministerial officers to do their duty, upon the one hand he will not be compelled to see that the proper entries of filing are actually made, but upon the other hand the respondent, upon the appeal, will likewise not be permitted to suffer for any dereliction of which the clerk may be guilty. But all this presupposes a compliance with the law in the attempted matter of the filing, and in this we think something more is contemplated than a haphazard delivery to the officer, wherever he may chance to be found. Constructive notices, notice and knowledge charged by filing and recordation, form a very essential part of our system of jurisprudence and of our deraignment of title. In all cases the law has provided a proper officer and a known office in which he is to transact his official business. Regardless of the varying phraseology of the statutes, in contemplation of law a paper whose filing carries notice, or affects private rights, is filed only when deposited with the proper officer at his office for this especial purpose. We do not mean by this that there are not many acts which a ministerial officer may do outside of the four walls of his office. Nor do we mean to be understood, as has been said, that when a proper filing or offer of filing has been made by a party, that he shall suffer for the remissness of the clerk in the performance of his duty. But the proper offer means more than a mere presentation to the officer. It means a presentation to him at the proper place, and within the proper time. When this has been done, the party is required to do no more, and he will not be endangered in any of his rights by the failure of the clerk, in turn, to perform his duty. As was said in *Tregambo v. Comanche etc. Mining Co.*, 57 Cal. 501: "Filing a paper consists in presenting it at the proper office and leaving it there, deposited with the papers in such office." *Edwards v. Grand*, 121 Cal. 254, is also here in point. That case turned upon the time of recordation of two separate instruments, both affecting the same property. The one had been presented at the recorder's office, and deposited with the recorder, at an hour too late to entitle it to recordation upon that day, but it

was left at the proper office, and with the proper officer, and with the request that it be recorded by him immediately upon the opening of his office on the following morning. The other paper was given to the recorder on his way to his office, upon the following morning, with a like request that it be recorded immediately upon the opening of his office. The recorder entered upon his record the time of filing of the two instruments as of the same day and moment. This court, in reviewing the cases, declared: "An instrument is filed for record when it is deposited in the proper office, with the person in charge thereof, with directions to record it. . . . Delivering an instrument to the proper officer, at a place other than the office where it is required to be filed, is not sufficient, even though the officer indorse it as properly filed." And so it was held that the instrument presented at the recorder's office in the afternoon took precedence as to time of recordation over that which was delivered to the recorder upon the street the following morning.

When section 940 of the Code of Civil Procedure speaks of filing the undertaking with the clerk, it means distinctly that it is to be presented for filing to him at his office. It would scarcely be said that if the attorney had found a deputy clerk traveling in another part of the state, and had there delivered to him the paper in question, and the clerk had carried it about with him until, his vacation being ended, he had returned to his office and its duties, that this would have been a compliance on the part of the litigant with what the law contemplates shall be done. It is the duty of the litigant, wherever he may find the officer, to see to it that within the time contemplated by law the paper shall have been deposited in the office, and it not infrequently happens that where, through negligence or unavoidable delay, cases such as this arise, the attorney accompanies the officer to his office, and there makes proper proffer of the paper; and this, as the law in such matters does not regard fractions of a day, may be done even at an hour when the general business of the office is suspended. In this case this was not done, and the adverse party, watching the clerk's office, as was his duty to do in protecting the interests of his client, found that after the expiration of the five days no undertaking upon appeal had been filed. We conclude, therefore, that the filing was not in time. Heretofore there has been

some diversity of opinion as to whether, under circumstances such as this, the filing of a proper undertaking within proper time being jurisdictional, upon a failure so to do the appeal should be dismissed by this court, or simply ignored as having no legal existence. This matter, however, has been finally settled by the case of *Centerville etc. Co. v. Bachtold*, 109 Cal. 111.

The appeal, therefore, is dismissed without prejudice to the prosecution of a new appeal.

Garoutte, J., McFarland, J., Harrison, J., Van Dyke, J., and Beatty, C. J., concurred.

[Crim. No. 734. Department One.—September 24, 1901.]

THE PEOPLE Respondent v. WILLIAM WILDER, Appellant.

CRIMINAL LAW—LARCENY OF COW—PARTICIPATION OF DEFENDANT—

SUFFICIENCY OF EVIDENCE.—The fact that another person than the defendant was the leading actor in the larceny of a cow, of which the defendant was convicted, cannot relieve the defendant from the verdict against him, where there is evidence that the defendant not only participated in the killing of the cow, but that both parties rode out together into the field where it was, and drove the animal to the corral where it was killed. The subsequent conduct of the defendant in attempting to dispose of the carcass was evidence that his original taking was larcenous.

ID.—INSTRUCTIONS REQUESTED BY DEFENDANT—STATEMENT TO JURY NOT PREJUDICIAL.—The statement to the jury that certain instructions given at defendant's request were asked for by the defendant, is unnecessary; but the defendant could not be prejudiced by such statement.

ID.—DISTRUST OF WITNESS—INSTRUCTION.—The instruction that "a witness who willfully testifies falsely as to one fact in giving his testimony is to be distrusted in other parts of his testimony," is in substantial accord with the Penal Code. The addition thereto, "If you find that a witness has deliberately testified falsely in one part of his testimony in this case, you have the right to reject the whole testimony of that witness which is not shown by other evidence to be true," though it could well be omitted, leaves the credibility of the witness with the jurors, and is not substantially erroneous.

ID.—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION NOT PREJUDICIAL.—An instruction that “there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence,” and that “a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow,” is of doubtful character, as a declaration of law, but is not prejudicially erroneous.

APPEAL from a judgment of the Superior Court of Contra Costa County and from an order denying a new trial. William S. Wells, Judge.

The facts are stated in the opinion of the court.

R. H. Latimer, and C. A. Reynolds, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

GAROUTTE, J.—Defendant has been convicted of grand larceny in stealing a cow, and now appeals from the judgment and order denying his motion for a new trial. His counsel presents various grounds to support his appeal, but they largely partake of a technical character, and the court will only consider the more important ones.

It is first insisted that the evidence tending to show a commission of the crime of larceny by the defendant is not sufficient to support the verdict. One Schwikerath appears to have been the leading actor in the commission of the crime. The beast was driven from the field to the corral and there killed, the defendant participating in both of these acts. The contention is made that Schwikerath stole the animal at some time prior to the aforesaid driving and slaughtering. In other words, it is claimed that the animal was stolen before the defendant assisted in driving it to the corral prior to the slaughter, and therefore it could not be stolen again by him.

The evidence does not present a legal question of the nicety here suggested; for the testimony of Schwikerath is to the effect that he and defendant rode out into the field and drove the animal to the corral and there killed it. Under these circumstances, if one of these parties was guilty of larceny, the other was equally guilty. And the jury was justified in declaring, from defendant's subsequent conduct in attempting to dispose of the carcass, that his original taking

was larcenous. Indeed, taking the entire evidence into consideration, we hold that it is ample to support the verdict rendered against him.

Some point is made by reason of the fact that the court prefaced the giving of certain instructions to the jury by the statement that they were asked to be given by the defendant. It is a proper practice to indicate by the record which of the parties asked the instructions given and refused. At the same time, it is not necessary to inform the jury that certain instructions read to them were requested by any particular party to the litigation.

Jurors have nothing to do with that matter. Yet we find no objection in the record to the practice here followed, and indeed we are not cognizant of any substantial objection that could be made to that practice, for we are at a loss to see how defendant's rights may have been in any way prejudiced by what was done.

An exception was taken to the following instruction: "A witness who willfully testifies falsely as to one fact in giving his testimony is to be distrusted in other parts of his testimony. If you find that a witness has deliberately testified falsely in one part of his testimony in this case, you have the right to reject the whole testimony of that witness which is not shown by other evidence in the case to be true." The first part of this instruction, in substance, is found in the Penal Code. (*People v. Sprague*, 53 Cal. 491.) The latter part of the instruction could well have been omitted, but upon an examination of it we find that it in no sense makes it mandatory upon the part of the jurors to reject the testimony of the witness. It is not even advisory to that effect. It simply leaves the credibility of the witness with the jurors, and is not substantially erroneous.

Exception is taken to the following instruction: "There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow." It may be said that as to this instruction containing a declaration of law there may be grave doubt, but as to the statements there contained not being prejudicially erroneous there is no doubt. *People v. Vereneseneckcockcock*

hoff, 129 Cal. 509, does not go to the length of holding such an instruction reversible error.

There is no merit in the remaining assignments relied upon by appellant.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1808. Department Two.—September 24, 1901.]

**WILLIAM LOWERY, Respondent, v. SAN JOAQUIN
AND KINGS RIVER CANAL AND IRRIGATION
COMPANY, Appellant.**

**INJURY FROM FLOOD-WATER—BACK-WATER FROM DAM—LEVEL OF LAND
—VERDICT AGAINST EVIDENCE.**—A verdict for the plaintiff for damages for injury to his land and crops from flood-water, alleged to have been occasioned by back-water from defendant's dam, is against the evidence, where it affirmatively appears that the back-water from the dam was below the natural level of the plaintiff's land, and there is no evidence to the contrary.

ID.—INFERENCE AGAINST LAWS OF PHYSICS.—No reasonable inference can be drawn contrary to the laws of physics and the course of nature, that the back-water below the level of the plaintiff's land either caused or contributed to the injury to the plaintiff's land.

ID.—MEETING OF FLOOD-WATERS WITH BACK-WATERS—SPECULATIVE ASSUMPTION.—Where it appears that flood-waters from another source stood at plaintiff's levees two feet higher than the highest point of overflow thereof at the dam, the verdict cannot be supported upon the mere speculative assumption that the injury might have been occasioned by the meeting of the waters tending to raise the level of the back-water at the place of meeting.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion of the court.

Frank H. Short, E. B. & George H. Mastick, and W. B. Treadwell, for Appellant.

M. K. Harris, and N. C. Coldwell, for Respondent.

HENSHAW, J.—Plaintiff sued to recover damages to his land and to the crops growing thereon, alleged to have been occasioned by defendant's dam. The answer denied that the flooding was caused by the dam, and affirmatively pleaded a prescriptive right in defendant to the maintenance of the structure. The cause was tried before a jury, verdict was rendered for plaintiff, and from the judgment which followed and from the order denying it a new trial the defendant appeals.

In 1871 the defendant erected a dam across the San Joaquin River, commenced the construction of its canal for irrigating purposes, and ever since that time has maintained the dam, and by means of it has diverted water into the canal from the San Joaquin River, and has furnished that water to the inhabitants of certain counties for purposes of irrigation. For more than five years prior to the flooding of plaintiff's land, the dam was continuously maintained at its present height. Plaintiff was the lessee of the flooded land. In his lease it was provided that he should surround it with levees sufficiently high and strong to protect the land from the overflow of water, and to maintain and guard it against breaks, and that the lessor should not be liable on account of the breakage of levees. In its natural condition the land was low, and part of it was designated as swamp and overflowed land. Before the erection of the dam, it had been constantly subject to overflow in the wet seasons. Plaintiff went into possession under his lease, built a levee about the land, and proceeded to cultivate it. It was under cultivation when the flood-waters of the San Joaquin broke the levee and destroyed the crop. Upon the left bank of the San Joaquin River, just above the dam in question, is Fresno Slough. About ten miles above the mouth of Fresno Slough, and at the nearest point perhaps half a mile distant therefrom, is plaintiff's land. Nineteen miles above the dam, and upon the same side of the river, is Four Tree Slough. Four Tree Slough, at seasons of flood, carries a large body of water from the San Joaquin River, and discharges it into the low land or basin, composed, in part, of plaintiff's land. It is some six or seven miles from the mouth of Four Tree Slough to plaintiff's land.

There was no direct evidence that defendant's dam caused the overflow. It rests upon inference from the known laws of physics, and from the actual physical conditions shown

to exist at the time the levee gave way. It being a law of physics that water seeks a common level, it may be mathematically demonstrated in any given case to what height a dam, or other obstruction, made across a stream will raise the impounded waters. It is known with much exactness, for example, how far the influence of the stupendous dams in process of construction across the river Nile will be felt, and the area of the lands which will be affected by them. In this case, at the time plaintiff's levee broke, the water was flowing freely over the dam to a depth of over $3\frac{1}{2}$ feet. It was physically impossible, therefore, for the dam to have impounded and back up the water of the river to any greater height than this. Yet that height was $3\frac{3}{4}$ inches below the level of the natural ground of plaintiff's land, where the break occurred, while the break in fact occurred when the water was standing some 18 inches high against the levee. Considering first the backing of the waters up Fresno Slough, occasioned by the dam, it is clear from the evidence of plaintiff's expert that the effect was felt only eight or ten miles above the mouth of Fresno Slough, and taking that fact in connection with the other fact, proved without dispute, that the level of the highest water of the dam was $3\frac{3}{4}$ inches below the natural ground-level of plaintiff's land, it amounts to a demonstration that the water backed by the dam up Fresno Slough could not have occasioned the damage. Upon the other hand, the bottom of Four Tree Slough is nearly twenty-four feet higher than high-water mark at the dam. It is manifest, therefore, that the dam could not have contributed to the outpour of water, admittedly of immense volume, which swept through Four Tree Slough onto plaintiff's land. Upon all these matters there is not even a conflict in the evidence. Mr. Norboe, plaintiff's expert, admitting the insufficiency of his *data*, testified merely that the dam backed the water up Fresno Slough "somewhere from eight to ten miles," and he nowhere testifies that the dam did affect, or could have affected, the waters of Four Tree Slough. Upon the other hand, the defendant's expert engineers—Messrs. Allardt and Teilman—testified from elaborate *data* before them, that the dam could not by any physical possibility affect the height of the water in the river so far up stream as the exit of Four Tree Slough, and showed further, that accepting Mr. Norboe's declaration that the dam backed water up Fresno Slough eight or ten miles, still the highest

possible point to which the dam could have affected the surrounding country was $3\frac{3}{4}$ inches lower than the level of plaintiff's land.

It is further shown without conflict that Four Tree Slough, in seasons of flood such as this, carries an immense volume of water, and discharges it upon the low plain where plaintiff's land is situated, and it is shown that plaintiff's land was constantly subject to overflow at high water. The very lease provides for the building and maintenance of levees, and exonerates the owner of the land from damages which may be occasioned by floods. It seems clear that the cause of the break in plaintiff's levee was the immense volume of water hurled against it, and standing eighteen inches high upon the levee,—water which was carried by Four Tree Slough; and, as has been said, since the bottom of Four Tree Slough was twenty-four feet higher than the top of the dam, it is a physical impossibility that the dam could have affected the discharge by the river of its waters into this slough. It is said, however, that the meeting of the water coming down Four Tree Slough with the water backed up Fresno Slough would have a tendency to raise the level of the water at the place of meeting, and thus the injury might have been occasioned by this combination of circumstances. But there is absolutely no evidence that it was so occasioned. The raising of the height of the water under such circumstances, and while it was freely discharging itself over the dam, could, at the most, so far as the dam influenced it, have been but slight and temporary. Yet it is here shown that the water raised and stood against plaintiff's levees nearly two feet higher than the highest point of the overflow at the dam. All reasonable inferences may be indulged from proved facts, but no inference may be upheld which is contrary to reason, to physical laws, or the course of nature. It is not sufficient, therefore, in the face of direct and positive testimony, that this result could not have been so accomplished, to support the verdict upon the mere assumption that it might have been so accomplished. A defendant may be held responsible for damages upon proof, if it be the best that can be offered, that the injury probably resulted from his own wrong-doing or neglect, but a verdict cannot be sustained upon the mere speculative theory that the damages might have been so occasioned.

We are unable to discern, therefore, within the evidence in

this case, any reasonable ground for saying that the plaintiff's injuries were occasioned by reason of the dam, and the judgment and order must therefore be reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

[S. F. No. 2293. Department One.—September 25, 1901.]

C. H. JAMES, Appellant, v. E. G. LYONS COMPANY,
Respondent.

ACTION UPON DRAFT—LIABILITY OF DRAWEEES—WRITTEN PROMISE OF ACCEPTANCE.—An unconditional promise, in writing, to accept a draft or bill of exchange is a sufficient acceptance thereof in favor of every person who, upon the faith thereof, has taken the bill for good consideration, and a promise by the drawee, to the effect that a bill, when due, shall meet due honor, amounts to an acceptance, and renders the drawee liable in an action upon the draft, as an accepted draft, by an assignee thereof for value.

ID.—PROMISE BY SELLERS OF MERCHANDISE TO MEET DRAFTS BACK.—Where sellers of merchandise in this state, to purchasers in another state, made an agreement with them, evidenced by various letters, to assist them in meeting drafts for the price, under their understanding that the purchasers were to draw back upon the sellers for such part of the price as they could not meet upon maturity of the drafts of the sellers, on the faith of which agreement the draft in suit was made back by the purchasers, and assigned to the plaintiff for value, such agreement, interpreted in the light of all the letters evidencing it, and of a subsequent letter written and received while plaintiff held the draft, in answer to an immediate notification of the draft by the purchasers to the sellers, that the draft would be "duly protected on presentation," constitutes an unconditional promise, in writing, to accept the draft back, which renders the drawees liable thereupon to the plaintiff.

ID.—CONSTRUCTION OF CODE—GENERAL PROMISE TO MEET BILLS OF EXCHANGE.—Section 3197 of the Civil Code, making an unconditional promise, in writing, to accept a bill of exchange a sufficient acceptance in favor of every assignee for value who takes upon faith of the promise, is not to be construed as requiring that the promise, to be binding under the statute, shall relate to and describe a particular bill, or the bill sued upon. It is sufficient that it can be fairly inferred from the language of a general promise to meet bills of exchange, that it was intended to include the one upon which the action is based.

ID.—AUTHORITY FOR DRAFT—PROMISSORY WORDS IMPLIED.—The promise to accept and pay a draft is necessarily implied from words of the drawees, authorizing the draft to be made upon them.

ID.—LIMITATION OF AMOUNT AND PURPOSE—PROMISE NOT CONDITIONAL.—The fact that the purchasers were authorized to draw back for an amount needed to meet the sellers' drafts does not make their promise to meet the drafts back conditional, rather than absolute; but the limitation is merely one as to the amount and purpose for which the drafts were to be made, and the promise is absolute within those limitations.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Carroll Cook, Judge.

The facts are stated in the opinion.

Vogelsang & Brown, for Appellant.

Notwithstanding the limitation of possible shortage of funds upon which the drafts were to be drawn, the promise to accept, within such limitation, must be regarded as unconditional. (*Merchants' Bank v. Griswold*, 72 N. Y. 472;¹ *Bissell v. Lewis*, 4 Mich. 450; *Gates v. Parker*, 43 Me. 544; *Exchange Bank v. Hubbard*, 58 Fed. Rep. 530; *Monroe v. Pilkington*, 14 How. Pr. 250; *Putnam National Bank v. Snow*, 172 Mass. 569; *Whilden v. Merchants' etc. Bank*, 64 Ala. 32, 33;² *Smith v. Ledyard*, 49 Ala. 279; *Kennedy v. Geddes*, 3 Ala. 581;³ *Burns v. Rowland*, 40 Barb. 368; *Ruiz v. Renauld*, 100 N. Y. 256, 261; *Wakefield v. Greenhood*, 29 Cal. 598; *Naglee v. Lyman*, 14 Cal. 451.) An absolute authority to draw is an unconditional promise to pay. (*Merchants' Bank v. Griswold*, 72 N. Y. 472.⁴) The authority need not be phrased in the form of a legal document, but may be contained in the language of mercantile correspondence. (*Ruiz v. Renauld*, 100 N. Y. 256, 283.)

Reinstein & Eisner, for Respondent.

The promise in writing must be to accept a particular bill. (Civ. Code, sec. 3197.) It must describe a particular bill so that it cannot be mistaken. (*Coolidge v. Payson*, 2 Wheat. 66, 75; *Boyce v. Edwards*, 4 Pet. 121, 122; *Ulster County Bank v. McFarlan*, 3 Denio, 558, and cases cited; *Valle v. Cerre*, 36 Mo. 590;⁵ *Wildes v. Savage*, 1 Story, 27, 29; *Cassel v. Dows*, 1 Blatchf. 341, 342; *Von Phul v. Sloan*, 2 Rob. (La.) 149, 150.⁶)

¹ 28 Am. Rep. 159.

² 38 Am. Rep. 1, and note.

³ 37 Am. Dec. 714.

⁴ 28 Am. Rep. 159.

⁵ 88 Am. Dec. 161.

⁶ 38 Am. Dec. 207.

GRAY, C.—This action is based on an order in words and figures as follows:—

“\$325.00.

SAN ANTONIO, Mar. 5th, 1897

“At sight, pay to the order of D. Sullivan & Co. three hundred and twenty-five dollars, value received, and charge to account of Mayer & Adler.

“To THE E. G. LYONS Co., San Francisco, Cal.”

The order was duly assigned to plaintiff, and he seeks to maintain this action, as appears from his complaint, on the theory that defendant made an unconditional promise, in writing, to accept the order, and thereby actually accepted it, under the provisions of section 3197 of the Civil Code. On the trial before the court without a jury, the plaintiff suffered a nonsuit, and thereafter took this appeal from the judgment, within sixty days after the entry thereof.

The question for determination now is, Did the defendant accept the order in suit?

The facts bearing on the question are as follows: In 1896 the defendant corporation was selling and shipping goods to the firm of Mayer & Adler, at San Antonio, Texas; and it appears that defendants collected for these goods by drawing upon Mayer & Adler for the price thereof, and then permitting Mayer & Adler to meet these drafts by drawing back on defendant for any part of the said price that the firm might not have at their command. These various drafts back and forth passed through the banking-house of the firm of D. Sullivan & Co., doing business at San Antonio. In the course of its business dealings in the matter of these sales, the defendant sent telegrams and letters to Mayer & Adler as follows: On May 12, 1896, it telegraphed, “Pay acceptance fourteenth draw back on us for what you require and send short paper.” Again, on May 13, 1896, it telegraphed, “Pay our draft and draw back on us for amount need.” On November 11, 1896, it wrote: “We have had occasion to discount your acceptances, amongst others, with our bank, and hope you will be in a position to meet them promptly. Should you, however, at any time find yourselves short, honor your paper and draw on us for amount you may require.” These telegrams and this letter were severally shown to D. Sullivan & Co., and, on the faith of the same, said banking firm, on the several occasions mentioned, bought and paid for the drafts of Mayer & Adler

drawn upon the defendant for amounts sufficient to meet the requirements of said telegrams and letter; and it seems that these several drafts were promptly paid by the defendant on their subsequent presentation at San Francisco. Thereafter, on February 9, 1897, the defendant wrote from San Francisco to said Mayer & Adler, at San Antonio, as follows: "We must request of you again to send us your acceptances to cover invoices, Nov. 20th, \$109.38; Nov. 27th, \$200; Dec. 18th, \$195.50, at four months. We find ourselves obliged at times to use these papers, and the unnecessary delay in forwarding same inconveniences us. We do not want to be kickers, as you seem to think we are, yet you should give our letters a little more attention. We are at all times willing to assist you in meeting these papers as per our understanding—viz., should you find yourselves short at their maturity, to draw back on us for part of them. Hoping that you will comply with our request without further delay we remain," etc. This letter was shown to the bank on February 17, 1897, and on the strength of it they purchased Mayer & Adler's draft on the defendant for two hundred dollars, and this draft was also thereafter promptly paid by defendant. On the 5th of March, 1897, the bank, still having defendant's said letter of February 9th in their hands, on the faith thereof purchased the draft for \$325, upon which this suit is based. On the same date—March 5th—Mayer & Adler wrote to defendant, notifying it of the last-mentioned draft, and in due time thereafter received a reply from it, dated San Francisco, March 10, 1897, and reading as follows: "We are in receipt of your letter of the 5th. Your draft on us for \$325 will be duly protected on presentation," etc. The bank forwarded the said draft to another bank for collection, but in some manner it was lost. Thereafter, on March 31, 1897, a duplicate of the draft was given by Mayer & Adler to the bank, and on the subsequent presentation of this to defendant it denied that it owed D. Sullivan & Co. anything, and refused payment on that ground. On March 27, 1897, Mayer & Adler failed in business, and became unable to pay their obligations.

We think that the letter of February 9, 1897, read and interpreted in the light of what had preceded it, as well as what followed it, contained an unconditional promise, in writing, to accept the instrument upon which the suit is based.

Section 3197 of the Civil Code reads as follows: "An unconditional promise, in writing, to accept a bill of exchange is a sufficient acceptance thereof, in favor of every person who, upon the faith thereof, has taken the bill for value or other good consideration."

The above section is, in substance, the same as the statute of 1850 of this state regarding the same subject, and under that statute, in *Wakefield v. Greenwood*, 29 Cal. 598, this court held as follows: "The promise by the drawee to pay the bill is, by necessary intendment, a promise to accept, just as the payment by him implies and includes, at the same time, the acceptance of the bill. In *Wynne v. Raikes*, 5 East, 514, which was an action brought against the drawees to charge them as acceptors of the bill, the acceptance was found in their letter, in which they said: 'We shall accept, or certainly pay, all the bills,' etc. Lord Ellenborough said that a promise to pay is an acceptance. And so in this case, the promise to pay, if so made as to bind the defendant, is to be deemed a promise to accept the bill. In an action on the bill against the drawee, who has promised to accept, he is sued as the acceptor, and the allegation in the complaint is, that the defendant accepted the bill. Such was the nature of the action and the form of the pleadings in *Coolidge v. Payson*, 2 Wheat. 66, which has been regarded in the United States as a leading case in respect to the liability of the drawee upon his promise to accept. (See also *Greele v. Parker*, 5 Wend. 414; *Parker v. Greele*, 2 Wend. 545; *Wilson v. Clements*, 3 Mass. 1.) In *Clark v. Cock*, 4 East, 57, Lord Ellenborough, in delivering the opinion of the court, said: 'And it has been laid down in so many cases that a promise that a bill, when due, shall meet due honor amounts to an acceptance, and that without sending it for a formal acceptance in writing, that it would be wasting words to refer to the books on this subject.' The eighth section of the statute of 1850 of this state, relative to bills of exchange and promissory notes, provides that 'an unconditional promise, in writing, to accept a bill before it is drawn shall be deemed an actual acceptance in favor of any person who, upon the faith thereof, shall have received the bill for a valuable consideration.' It thus appears that the drawee, under such circumstances, is liable to the payee or indorsee, and should be sued as the acceptor of the bill."

We cannot concur in respondent's position that the promise to be binding under the statute, must relate to and describe a particular bill or *the* particular bill referred to in the complaint. It is sufficient if it can be fairly inferred from the language of the promise that it was intended to include the bill of exchange upon which the action is based. This is illustrated in the case of *Naglee v. Lyman*, 14 Cal. 451, wherein it was held that bills of exchange drawn in pursuance of a letter of credit authorizing the drawing of bills upon the writer to an extent named, and agreeing to accept the same, were to be treated as actually accepted by the writer of the letter. And yet the letter contained no description of any particular bills. In *Merchants' Bank v. Griswold*, 72 N. Y. 472,¹ a draft was held to be accepted by a certificate signed by defendant in advance of the making of the draft. The certificate is dated, and reads as follows:—

"To whom it may concern: This is to certify, that I hereby authorize Horace Loveland, as my agent, to make drafts on me, from time to time, as may be necessary, for the purchase of lumber for my account, and to consign the same to the care of P. W. Scribner & Co., Whitehall, N. Y.

"(Signed)

A. H. GRISWOLD."

The language of the New York statute makes use of the articles "a" and "the" exactly as they are used in our statute, for it reads: "An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance, in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration." (1 N. Y. Rev. Stats., p. 768, sec. 8.) No contention was made, in the case cited from New York, that the particular draft in suit was not described in the written promise, or was not fairly included within its terms.

The promise to accept and pay the draft is a necessary implication from the authority to draw contained in the letter of February 9th. (*Merchants' Bank v. Griswold*, 72 N. Y. 472.¹)

As particularly applicable to the facts of this case, we quote from *Ruiz v. Renauld*, 100 N. Y. 256, as follows: "But the appellant's contention is, that the language of the letter is not explicit, does not promise to accept and pay, and is ambiguous. Reading it in the light of its surroundings,

¹ 28 Am. Rep. 159.

it is explicit and unambiguous. It requests a renewal of the character and by the process which both parties understood, and plainly authorized the drafts which were made. Special promissory words were unnecessary, where the language employed sufficiently imported a legal obligation. The authority need not be phrased in the precise and formal language of a legal document. Mercantile correspondence rarely has that characteristic, and often is abbreviated, and assumes what is readily understood. It is enough, in the present case, that the defendant's letter authorized the draft when it requested the renewal which could only be made by that process, and was expected so to be made."

The New York cases *supra* also dispose of the point made by appellant, to the effect that the promise contained in the letter of February 9th was conditional upon Mayer & Adler finding themselves "short," and that they were authorized to "draw back" only for a part of the amounts due to defendant. In *Merchants' Bank v. Griswold*, 72 N. Y. 472,¹ language similar to this is held not to express a condition, but to be a mere limitation as to the amount and purpose for which the drafts were to be made.

The statute, in speaking of an *unconditional* promise, uses the word as it is generally used and understood in the law of contracts, and it was intended only that the promise spoken of should be free from all those limitations which are usually referred to as conditions in treatises on contracts. It was clearly not contemplated that a mere limitation as to the amount or purpose of the drafts would render the promise conditional, within the meaning of the statute. In Black's Law Dictionary such a condition is defined to be "a clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation." For promises similar to that involved in this case which have been held to be unconditional promises to accept, see also the following cases: *Whilden & Sons v. Merchants etc.*, 64 Ala. 1, at pp. 32, 33;² *Bissel v. Lewis*, 4 Mich. 450.

The last case cited above also illustrates that it is not necessary that the written promise to accept should be addressed to the party who seeks to take advantage of it, but it is sufficient if it be addressed to the maker of the draft or bill

¹ 28 Am. Rep. 159.

² 38 Am. Rep. 1, and note.

of exchange, and that the plaintiff has purchased the draft on the faith of it, as in this case.

We are aware that there are cases which take a view of the questions involved, opposed to those hereinbefore expressed, but we prefer to stand by the cases cited herein as presenting the true rule governing the question.

The evidence, without conflict, shows that the draft in suit was within the limits as to amount and purpose contemplated in the promise of defendant, and that such promise was an unconditional promise, within the meaning of said section 3197 of the Civil Code.

The court therefore erred in granting the nonsuit.

We advise that the judgment be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Van Dyke, J., Garoutte, J. Harrison, J.

Hearing in Bank denied.

[Sac. No. 863. Department One.—September 25, 1901.]

ALLEEN HARRINGTON, Appellant, v. JOHN BAPTIST
BOEHMER et al., Respondents.

PUBLIC LANDS—UNITED STATES SURVEY—LOCATION OF TOWNSHIP—DETERMINATION BY MONUMENTS IN FIELD.—The location of a township upon the public land of the United States is where the government surveyor has actually lined it out, and is to be determined by the monuments placed by him in the field.

ID.—CONTROL OF PLAT BY FIELD-NOTES—CORRECTION OF PLAT.—In case of discrepancy between the field-notes and the plat, the plat must give way to the field-notes; and the land department may properly correct the plat so as to conform to the field-notes. The plat as corrected supersedes the original.

ID.—EJECTMENT—FAILURE OF PLAINTIFF'S TITLE—SWAMP-LAND PATENT—TRACT NOT INCLUDED IN GOVERNMENT SURVEY.—A plaintiff in ejectment must fail, where he claims under a swamp-land patent from the state, which confers no title, where the field-notes of the government survey of the township and the corrected plat thereof show that there is no such tract of land as that described in the

patent; and it is immaterial that such tract appears upon the original plat of the survey.

Id.—EVIDENCE—LOCATION OF RIVER AS BOUNDARY—CHANGE NOT PROVED—HARMLESS RULING.—Where the Sacramento River formed a boundary of the land claimed by the plaintiff, and the case was tried and findings made on the theory that there had been no change in the location of the river since 1850, a change thereof will not be presumed. The refusal to allow a witness for plaintiff to prove its location since 1850 will be deemed harmless, where no offer appears to prove a change of location by the witness.

Id.—PROOF OF FIELD-NOTES—CERTIFIED COPY—HARMLESS EXCLUSION OF ORIGINAL.—A certified copy of the field notes of the government survey is competent evidence thereof, and if placed in evidence by the defendants, the exclusion of the original notes, when offered in rebuttal, was harmless, where no discrepancy between them was made to appear.

APPEAL from a judgment of the Superior Court of Colusa County and from an order denying a new trial. H. M. Albery, Judge.

The facts are stated in the opinion.

John T. Harrington, for Appellant.

Dyas & Howard, for Respondents.

GRAY, C.—This action was brought to recover possession of a tract of land alleged to be situated in Colusa County, and described as lot 3 of section 24, in township 17 north, range 2 west, Mount Diablo meridian, and containing 54 acres, according to the United States plat thereof. The defendants had judgment, and plaintiff appeals from said judgment and from an order denying her motion for a new trial.

The plaintiff claims title to the premises in dispute, as swamp and overflowed land, under a patent from the state of California, dated June 20, 1899. The defendants claim that the land, of which they are in possession, and that plaintiff seeks the possession of, is in fact a part of the south half of the south half of section 19, in township 17 north, range 1 west, and that the Central Pacific Railroad Company is the patentee from the United States government of said portion of section 19, which is more particularly described as the south half of the southeast quarter, lot 4 of the southwest quarter, and the southeast quarter of the southwest quarter of said section 19. Defendants claim under the title of the

railroad company. To establish her title, the plaintiff introduced in evidence a patent from the state, purporting to convey land to her, described as in her complaint. She also introduced in evidence a plat purporting to be a plat of township 17 north, range 2 west, approved November 9, 1867. This plat was amended by the United States land department a year and some months after its approval, to make it correspond to the field-notes. By the plat before its amendment, it appeared that the Sacramento River ran through section 24 from north to south, and that 155 acres of said section lay on the east side of said river and bordering on the east line of said township, which township line was at the same time the west line of section 19, in the adjoining township 17 north, range 1 west. Said 155 acres of land was divided into three lots, numbered from north to south, 1, 2, and 3. Said lot 3, as it appears on said plat, embraces the east 54 acres of the south half of the southeast quarter of said section 24, and is bounded on the west by the Sacramento River and on the east by said township line. By the correction of the plat, the area of said section 24 lying east of the Sacramento River was reduced from 155 acres to about 42 acres, and this area was divided, according to the system of government surveys, into lots 1 and 2, consisting of 19 and 23 acres, respectively, thus eliminating lot 3 (the one involved in this suit) from the plat. The plat as corrected was placed in evidence, as was also the plat of township 17 north, range 1 west. It appears from the plats that the Sacramento River, in its general course, runs along the line between the two townships named, meandering across and intersecting the same at three different points. The western part of the township in range 2 west is covered by various Mexican grants, which are bounded on the east by the Sacramento River, and it so happens that only that part of the said township line on the east side of the Sacramento River was run in the field, and this part of the township line was run in connection with and as part of the survey of the township in range 1 west. The north and south lines of said section 24 were not run in the field, nor were any of the boundaries of the said lot 3, as indicated on the first plat of township 17 north, range 2 west. But the west boundary of section 19, township 17 north, range 1 west, is the eastern boundary of section 24, township 17 north, range 2 west. The field-notes as well as the plat of township 17 north, range 1 west, corresponding

to said notes, show clearly that the original plat of township 17 north, range 2 west, was erroneous. The corrected plat corresponds with the field-notes. Of course, where there is a discrepancy between field-notes and a plat, the latter being made from the former, and the former being the better evidence as to where the line was run in the field, the plat must give way to the field-notes. (*Whiting v. Gardner*, 80 Cal. 78.) The question in all cases similar to this is, Where were the lines run in the field by the government surveyor? A government township lies just where the government surveyor lines it out on the face of the earth. These lines are to be determined by the monuments in the field. The field-notes show that the north line of said section 19 was run from the northeast corner thereof a distance of 69.19 chains to the west, and terminated at the Sacramento River, and that the south line of said section was in length 77.50 chains, with its western terminus "the bank of the Sacramento River." The eastern bank of the Sacramento River is also meandered for a distance near the southwest corner of said section, as well as for a distance near the northwest corner thereof, as the western boundary of the section. The natural monument, therefore, by which to fix the township line and the western boundary of said section 19, and at the same time the eastern line of said section 24, was the bank of the Sacramento River, according to the undisputed field notes of the government survey. These field-notes give the land in controversy to the defendants, and show that there is no such land as that described in the complaint and in the patent from the state to plaintiff. It is not contended that there had been any change in the channel or bank of the Sacramento River, but, on the contrary, the appellant, as appears by her reply brief, contends that there had been no change in the river at that point.

It is at all times proper for the land department to correct a government plat to correspond to the government field-notes, when such notes show that the plat delineates land where there is no land, according to the field-notes. Of course, the plat as corrected superseded the original, and it would be strange indeed if parties could ignore this correction, and base a title on the mistake of a map-maker, thirty years after such mistake had been corrected on the face of the record. The plaintiff failed to establish title to the land described in her complaint, because the evidence shows that there is no such tract of land as that described, and the finding

against her title was therefore proper. According to the corrected plat, there is a small triangular piece of land between the river and the land of defendant, comprising about four or five acres, which seems to lie in said section 24, and within the boundaries of the said lot 3, claimed by plaintiff, as those boundaries were marked on the original plat; but on the corrected plat this small piece of land is a part of lot 2, in said section 24. As to this, however, plaintiff makes no claim, and there is no controversy concerning it.

The appellant called as a witness W. S. Green, and asked him as to where the river was from 1850, "with reference to its *locus* at this time." The witness was not permitted to testify as to the matter, and this is urged as error. It does not appear from the transcript whether the appellant desired to show by the witness that there had been a change in the river, or the contrary, but, in the reply brief, appellant, in speaking of Green's knowledge, says: "He knew the location of the river at that point before the swamp-land grant to the state was born, and knew that there had since been no change in the location." The case seems to have been tried on the theory of no change in the river, and the findings proceed upon the same theory; and in the absence of any evidence at all on the question (and there seems to have been none), it would not be presumed that there had been any change in the river that would affect the case. The appellant was not injured by the exclusion of the evidence.

The record shows that a certified copy of the field-notes pertinent to the case were put in evidence by the respondent, and a copy of these field-notes, so far as they relate to the meanders of the river, appears in the record, on the face of a plat marked "Defendants' exhibit 9." The appellant, in rebuttal, offered in evidence the originals of these field-notes; but no suggestion was made that there was anything wrong with the certified copy already in evidence, or that the originals would in any way change or affect any aspect of the case; and as the certified copy was competent evidence, we cannot see how the appellant could have been hurt in any way by the exclusion of the original.

Several other alleged errors of the court in ruling upon the admission of evidence are enumerated by appellant, but no argument is presented in support of the points thus made,

and for that reason we do not deem it necessary to notice them in detail. It is deemed sufficient to say that the undisputed field-notes supported the contention of respondents, and it is difficult to see how any of the rulings complained of could have affected the findings or judgment in the case.

We advise that the judgment and order be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 6th of October, 1901:—

BEATTY, C. J.—I dissent from the order denying a re-hearing. The demanded premises are bounded on the east by the township line, and on the west by the Sacramento River. The size of the tract depends upon the distance apart of these two boundaries. According to the original plat of the township, the distance was sufficient to give a tract of fifty-four acres (lot 3), but the amended plat, corrected by the field notes, reduced that part of lot 3 between the river and the township line to an area of four or five acres, according to the opinion of the Commissioner. I think its area is shown to be somewhat greater, but conceding that it was not more than five acres, the evidence clearly showed, and without conflict, that it belonged to plaintiff, and that defendants were occupying it without right. The lands to which they have title all lie east of the township line. The plaintiff owns all west of the township line, to the river bank, and whether that is much or little, she was entitled to recover it in this action, with her costs. I do not see how it can be said that there is no dispute about this small tract. The principal dispute, of course, was as to the location of the township line with reference to the river bank,—the plaintiff claiming according to the original plat,—but the denial of her claim in that respect was no reason for depriving her of the small area left within her boundaries by the amended plat. The tract—whether large or small—between those boundaries was the thing in dispute.

[Crim. No. 769. Department One.—September 26, 1901.]

THE PEOPLE, Respondent, v. J. A. WARREN and WILLIAM WARREN, Appellants.

CRIMINAL LAW—EVIDENCE—DECLARATIONS OF THIRD PERSONS.—Upon the trial of defendants accused of felony, the declarations of third persons, not made in the presence or hearing of the defendants, are hearsay and incompetent; and where such declarations were admitted upon insistence of the district attorney, and were of such a character that they might have tended to prejudice the jury, to the injury of the defendants, their admission will be deemed prejudicial error.

ID.—IMPEACHMENT OF WITNESS—INDICTMENT AND TRIAL FOR SAME OFFENSE.—A witness for the defendant cannot be impeached, upon cross-examination, by showing that he had been indicted and tried for the same offense, without seeking to show that he had been convicted of a felony.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion.

Charles A. Palmer, for Appellants.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

COOPER, C.—The defendants were convicted of grand larceny, in the felonious stealing and driving away of four calves, the property of one Luchessa. They appeal from the judgment and from the order denying their motion for a new trial.

During the trial, the court, under defendants' objection, admitted many conversations and statements of third parties, not made in the presence or hearing of either of the defendants. It will be sufficient to state only a few of such statements, as they are all of the same general character.

The prosecuting witness, Luchessa, testified that a short time after he missed his calves, and while riding over the ranch of defendants with two or three other parties, they met one Bob Warren, who rode up in front of them. The district attorney then asked the following question: "Q. Well, what occurred there, when Bob stopped you?" This question

was objected to, as incompetent, and not binding upon defendants, as neither of them was present at the time. The district attorney stated that the evidence was admissible for the purpose of showing that a crime was committed by some one, and that he would follow it up and show the connection. The court overruled the defendants' objection, and the witness testified that Bob Warren rode in front of him, and stopped him, cursing him, and calling him vile names, and among other things, said, "You been sneaking around this ranch long enough." The witness further testified to meeting Bob Warren on another occasion, and when asked concerning a conversation that took place, defendant objected, upon the ground that the conversation was incompetent, immaterial, and not in the presence of the defendant. The objection was overruled, and the witness was permitted to testify to very abusive language and epithets applied to him by Bob Warren, and that Bob got down off his horse and wanted to fight witness.

Similar rulings were made as to statements and threats in the hearing of the witnesses Mayfield, Van Gordon, and Arbuckle, and not in the presence or hearing of either of the defendants.

The following question was asked by the district attorney of the witness Mayfield: "Q. When you say he abused him, what do you mean by that? What did Bob Warren say, as near as you can recollect?" This question was objected to, as incompetent and hearsay, and the objection overruled. The witness answered: "Called him a son of a b—— Swiss, and said he must be up to some meanness, or he would not be there."

The witness Van Gordon, under similar objections by defendants, was permitted to testify to several such conversations with Bob Warren, and that Bob Warren called Luchessa vile names, and said that Luchessa rode over the place, "looking down his nose like a whipped pup."

The witness Arbuckle, under defendants' objection, was permitted to testify to several threats and abusive language used by Bob Warren to Luchessa; that Bob Warren asked witness if he had seen Luchessa around the place, and in the conversation said, "If I find him down there alone somewhere, there is liable to be a little Swiss blood spilled."

The objections to all this class of evidence should have been sustained. The defendants were not present, and were not bound by statements and declarations of Bob Warren, made

in their absence. If the declarations and statements were immaterial and irrelevant, they should have been excluded; if they were material, they certainly were incompetent and hearsay, and were calculated to injure defendants before the jury. As to how much effect such testimony had upon the jury, it is not our business to decide. It is sufficient that it was hearsay, and was of such character that it might have influenced the jury, to the injury of defendants. There might be a case in which hearsay evidence was of such an immaterial character that we would not consider it of sufficient importance to justify us in reversing, but this is not one. The amount of such evidence in this record, the fact that the district attorney persisted in getting it before the jury, and the character of it, justifies us in the conclusion that it probably tended to prejudice the defendants in the eyes of the jury. The defendants were entitled to a fair trial, to have none but competent evidence admitted, and to have the ordinary rules of evidence applied during their trial. If they could not be convicted upon such legal evidence and a fair trial, they should not have been convicted at all. (Code Civ. Proc., sec. 1870, subd. 3; *People v. Griffin*, 52 Cal. 616.)

The defendants called one George Warren as a witness, and he gave material testimony in their behalf. On cross-examination he was compelled to testify, under defendants' objection, that he had been tried in the superior court for the larceny of the same calves. The district attorney asked the following question: "Q. You have been indicted by the grand jury for the larceny of these calves,—the same calves,—have you not?" To this question defendants objected, upon the ground that it was incompetent, immaterial, and not cross-examination. The court overruled the objection, and the witness answered, "Yes, sir." This ruling was clearly erroneous. It is provided in section 2051 of the Code of Civil Procedure: "A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony."

It was not sought to show that the witness had been convicted of a felony. The fact that he had been indicted and tried for the larceny of the calves was not competent, neither

was it proper cross-examination. (*People v. Carolan*, 71 Cal. 196; *Jones v. Duchow*, 87 Cal. 114; *People v. Silva*, 121 Cal. 669; *People v. Hamblin*, 68 Cal. 103.)

It becomes unnecessary to decide as to whether or not the venue was sufficiently proven. The point will probably be obviated by the district attorney upon the next trial.

The judgment and order should be reversed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1904. Department One.—September 20, 1901.]

ADELE M. KEPFLER, Appellant, v. L. C. KEPFLER,
Respondent.

DIVORCE—DELAY OF FINDINGS—ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.—A delay of more than six months in the filing of findings, in an action of divorce, after judgment was ordered for the defendant, is not ground for a new trial, and cannot be considered upon appeal from an order denying a new trial to the plaintiff.

ID.—SUFFICIENCY OF FINDINGS—ULTIMATE FACTS.—Findings upon the ultimate facts in issue in the action for divorce, as to the grounds of divorce alleged and denied, are sufficient, and decisive of the case. It is not necessary to find upon facts merely probative of the ultimate facts found.

ID.—DESEPTION—DRIVING PLAINTIFF FROM HOME BY CRUELTY—FINDING AGAINST CRUELTY.—A finding which negatives every charge of cruelty alleged in the complaint must be treated as negating a charge of desertion by driving the plaintiff from her home by cruelty.

ID.—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE.—The testimony of the defendant, in contradiction of that of the plaintiff, is sufficient to support findings for the defendant.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion.

F. J. Castlehun, for Appellant.

George D. Collins, for Respondent.

GRAY, C.—Action for divorce on the grounds of habitual intemperance of defendant, inflicting a course of great mental anguish upon plaintiff, and the extreme cruelty of defendant. The defendant had judgment. The plaintiff moved for a new trial, and appeals from the order denying her motion. There is no appeal from the judgment.

1. The first point urged by appellant is, that findings were not filed until more than six months after the case was submitted for decision and the court had ordered judgment for defendant. This is not one of the grounds for a new trial specified in the code. (See Code Civ. Proc., sec. 657.) Nor can any such question be reviewed on an appeal taken only from the order denying a new trial. (*Brison v. Brison*, 90 Cal. 323; *Rauer v. Fay*, 128 Cal. 523; *Fogarty v. Fogarty*, 129 Cal. 46; *Owen v. Pomona Land and Water Co.*, 131 Cal. 530; *Reclamation District v. Thisby*, 131 Cal. 572.) The cases cited hold that the sufficiency of the findings to support the judgment cannot be considered upon an appeal from an order denying a new trial. It must follow that an objection based upon the ground here urged cannot be heard or considered upon such an appeal.

2. The court found that "the defendant was never habitually intemperate, nor was he ever intemperate from the use of intoxicating drinks to such a degree that by reason thereof a course of great mental anguish had been inflicted upon said plaintiff." The court further found "that the defendant has not treated the plaintiff with extreme cruelty, and has not inflicted upon her great mental suffering or anguish," and also, "that the defendants never inflicted upon the plaintiff grievous bodily injury nor grievous mental suffering."

The foregoing findings disposed of the ultimate facts in issue, and were decisive of the case, and it was unnecessary to make special findings on facts that were merely probative as to the ultimate facts already found. The complaint does not purport, on its face, to contain a cause of action on the ground of desertion, but the allegation therein contained as to defendant abandoning and deserting plaintiff was merely intended to help out the other allegations of the complaint as

to cruelty, and its effect in that direction is negated by the findings quoted against the claim of cruelty. If, however, we were to treat the allegations of the complaint as showing that kind of desertion, on the part of defendant, defined in section 98 of the Civil Code, which is occasioned by the cruelty of one of the spouses driving the other away from their home, still, the findings, negating the charges of cruelty as they do, must also be treated as negating the alleged desertion. We therefore think that the claim of appellant that the findings do not dispose of the material issues is not well taken.

3. As to the final claim of appellant that the findings are contrary to and not justified by the evidence, we have only to say that the testimony of defendant, if believed, was sufficient to warrant the conclusions reached by the court. The court evidently believed it, and it is not for this court to say that it was not true.

The order should be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 2251. Department Two.—September 27, 1901.]

J. S. REID, Respondent, v. C. C. CLAY, Appellant.

ACTION UPON STREET-ASSESSMENT—EVIDENCE—PRIMA FACIE CASE—UNTENABLE OBJECTIONS.—In an action to enforce a street-assessment, the warrant, assessment, certificate, and diagram, with the affidavit of demand and non-payment, are admissible as *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council, and of the right to recover in the action. Objections to the admissibility of such evidence for other purposes, and that the facts essential to the validity of the assessment do not appear, are untenable, and must be disregarded.

ID.—RECORD OF PAPERS—PRESUMPTION.—The statute does not expressly require that the assessment and accompanying papers shall be recorded, in order to be effective as *prima facie* evidence; and it seems that such proviso or condition cannot be deemed imposed upon the provisions of the act. It must be presumed from such

prima facie evidence that the contract and all papers required by law to be recorded were recorded.

ID.—INDORSEMENTS UPON PACKAGES—PRESUMPTION.—It must be presumed that indorsements made at different times upon a package of papers produced from the engineer's office, comprising the diagram, warrant, return, and certificate of the engineer, referred to by the indorsements made thereon, respectively, were in the package when the indorsements were made. It must be inferred that the papers required by law to be attached together were so attached, and it cannot be presumed, contrary to the indorsement, that the certificate of the engineer was not in the package, or was wrongfully made elsewhere than in the engineer's office.

ID.—ASSIGNMENT OF CLAIM BY GENERAL MANAGER OF CORPORATION—PROOF OF AUTHORITY.—An assignment of the street-assessment claim was sufficiently proved, where it was shown that it was made by the general manager of the corporation which did the work, and that he was in the habit of executing assignments and contracts on behalf of the corporation with the knowledge, assent, and acquiescence of its board of directors.

ID.—CONTRACT OF CORPORATION—EXECUTION BY SECRETARY—SEAL—PRESUMPTION—RATIFICATION—ABSENCE OF RESOLUTION.—The contract for the street-work, by a corporation, executed by its secretary, with the corporate seal attached, must be presumed, in view of the corporate seal, and of the *prima facie* case made by the plaintiff, to have been executed by the authority of the corporation; and where it appears that it was the custom of the corporation for its secretary, when present, to execute its numerous contracts, and that the contract was ratified by appeal of the corporation from the original assessment, proof of the absence of a resolution authorizing the contract cannot defeat it.

ID.—DESCRIPTION OF WORK—EXCEPTION OF WORK ALREADY DONE—DECLARATION OF POWER.—The description of the work, in the assessment contract and notice for bids, as being for laying granite curbs on a certain street, between two other streets, "where not already laid," and paving the roadway thereupon with bituminous rock, "where not already so paved," does not disclose any delegation of power to the street superintendent or contractor to determine the character and amount of the work to be done.

ID.—COMPLIANCE WITH SPECIFICATIONS—MATERIALS—SATISFACTION OF SUPERINTENDENT OF STREETS.—A provision in the contract that the contractor will do the described work "in a good and workmanlike manner, under the direction and to the satisfaction of the superintendent of streets," and "in compliance with the specifications hereunto attached, and made part of this contract," is, in effect, the provision required by section 4 of the act of 1889 (Stats. 1889, p. 171), that "the materials used shall comply with the specifications, and be to the satisfaction of the superintendent of streets."

ID.—NEW ASSESSMENT—ORDER—NEW DIAGRAM AND WARRANT IMPLIED.—Where it appears that the original assessment, diagram,

and warrant had been set aside upon appeal of the contractor, and "a new assessment, correcting a clerical error in making the former assessment," had been ordered, it is necessarily implied in the order that there must be a new and corrected diagram and warrant, if rendered necessary by the alteration in the assessment. It cannot be objected that the new assessment does not conform to the decision of the board, if such non-conformity does not affirmatively appear.

ID.—CERTIFICATE OF ENGINEER.—A certificate of the engineer is not required, or required to be recorded, except in the case provided for in subdivision 10 of section 5 of the act of 1889 (Stats. 1889, p. 171). Though he is empowered by section 34 of the act to make a certificate of the work done, such certificate, when made, is simply to assist the superintendent of streets in determining whether the contract has been satisfactorily performed, and its contents, if satisfactory to the superintendent, are immaterial to the validity of the lien.

ID.—STREET-IMPROVEMENT ACT—CONSTITUTIONAL LAW—CASE AFFIRMED.—The Street-improvement Act of 1889 (Stats. 1889, p. 171) is constitutional and valid. *Cohen v. City of Alameda*, 124 Cal. 500, affirmed.

ID.—DEMAND AND RETURN—SPECIFICATION OF PAYMENT—PRESUMPTION OF AUTHORITY.—The demand and return are not required by the statute to specify the person to whom the money is to be paid, that being obviously understood; and the authority of the party making it is to be presumed, in the absence of evidence to the contrary.

ID.—DEMAND BY ASSIGNEE AS AGENT.—The fact that the demand made by the assignee of the claim of lien was made as agent of the original contractor is immaterial.

ID.—ALLOWANCE OF ATTORNEY'S FEES—LIEN.—The plaintiff is entitled to have the attorney's fees allowed by the court in the action to enforce the assessment made a lien upon the land assessed.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. George H. Bahrs, Judge.

The facts are stated in the opinion.

F. A. Berlin, for Appellant.

J. S. Reid, and Bishop & Wheeler, for Respondent.

SMITH, C.—The plaintiff recovered judgment against the defendant, in the court below, for the sum of \$115.07,—the amount of a street-assessment on land of defendant in San Francisco,—with interest and costs, and the sum of \$15 at-

torney's fees, all of which is adjudged to be a lien on the defendant's land. The appeal is from an order denying the defendant a new trial. The facts of the case will be most conveniently stated in connection with the several points as they are discussed.

THE PLAINTIFF'S CASE.—On the trial, the "Certificate of the City Engineer," "Assessment, Diagram, and Warrant," and "Return," with indorsements as given below, were offered in evidence, and admitted over the objections of the defendant,—the indorsements being as follows: "2318. Assessment for paving, etc., Steiner Street, bet. Washington and Jackson streets, City Street Improvement Co., Contractor. Recorded this 20th day of April, 1896, in vol. 119, page 88. Thomas Ashworth, Superintendent of Public Streets, Highways, and Squares. Per John S. Bryan, Deputy." "Returned this 16th day of May, 1896, and Return recorded in vol. —, page —. Thomas Ashworth, Supt. Public Streets, Highways, and Squares. Per John S. Bryan, Deputy."

The objections made to the introduction of this evidence were numerous, but (with exceptions to be noted) they relate to the effect, rather than to the admissibility, of the evidence, and must therefore be regarded as untenable. Under section 12 of the act (Stats. 1889, p. 168) the "warrant, assessment certificate, and diagram, with the affidavit of demand and non-payment" were admissible as "*prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based." (*Jennings v. Le Roy*, 63 Cal. 397; *Jennings v. Le Breton*, 80 Cal. 8; *Ede v. Knight*, 93 Cal. 159; *Perine v. Erzgraber*, 102 Cal. 234; *Witter v. Bachman*, 117 Cal. 323.) Whether admissible for other purposes need not for the present be determined; though in fact the statute provides that they shall be *prima facie* "evidence of the right of the plaintiff to recover in the action."

The statute does not expressly provide that, to have the effect given them as evidence, the assessment and other papers referred to shall be recorded; nor has it been held in any of the cases to be necessary. We see no reason, therefore, for imposing such a condition or proviso upon the provisions of the act; but as we are satisfied that in this case the proof of record is sufficient, it will not be necessary to pass definitely on this point.

The indorsements on the papers (and there are obviously two, made at different times) must be regarded—so far as their terms indicate—as referring to all the papers in the package at the time, respectively, they were made; and as the package appears to have been produced from the engineer's office in the form in which it was offered, it must be presumed that the papers referred to by the indorsements, respectively, were in the package when indorsed. Indeed, as to all of them except the "Certificate of the Engineer," this is conclusively to be inferred from the fact that by the provisions of the law the diagram and warrant must be attached to the assessment, and the return indorsed on the warrant (Stats. 1889, secs. 8, 9, 10); and though there is no express provision requiring the certificate of the engineer to be attached, yet this seems to have been contemplated, and is probably customary. But however this may be, if the certificate had not been in the package when indorsed, to add it afterwards would have altered the effect of the indorsement, and if done with criminal intent, would, in effect, have amounted to forgery; and it cannot be presumed that this should have occurred in the office of the superintendent. (Code Civ. Proc., sec. 1963, subds. 1, 15.)

The remaining objections to the admissibility of this evidence relate to the validity of the assessment, and of the resulting lien, and will be more conveniently considered in the general discussion of those matters; to which we will presently proceed.

In addition to the evidence we have been considering, the plaintiff offered a written assignment to the plaintiff of the claim of the City Street Improvement Company, signed "City St. Improvement Co., J. W. McDonald"; and this was admitted over the objection of the defendant. In this we think there was no error, or at least no error that could have injured the defendant. It was admitted that McDonald was, at the time of making the assignment, the manager of the corporation; and it was subsequently proved, in rebuttal to evidence introduced by the defendant, that he was the president and general manager, and was in the habit of executing assignments and contracts on its behalf, with the knowledge, assent, and acquiescence of its board of directors. The authority of McDonald to make the assignment was, we think, sufficiently proved. (*Bergtholdt v. Porter Brothers Co.*, 114 Cal. 681; 1 Morawetz on Corporations, secs. 504, 509; 4 Thompson on Corporations, secs. 4849, 4850; Mechem on Agency, secs. 95, 97.)

Various objections to the assessment are made by the defendant, on the ground that facts essential to its validity do not appear; but these must be disregarded. The plaintiff's *prima facie* case was established by the evidence introduced, and it could not be overcome otherwise than by proof of the non-existence of such facts. (*Perine v. Erzgraber*, 102 Cal. 236, 238; *Gray v. Lucas*, 115 Cal. 436; *Hellman v. Shoulters*, 114 Cal. 158.) It remains, therefore, to consider only those objections that are supported by affirmative proof of the facts on which they are rested. These relate,—1. To the resolution of intention and resolution ordering the work; 2. To the contract; 3. To the assessment; 4. To the lien; and 5. To the demand of payment; and will be considered in the order stated.

1. Neither the resolution of intention nor the resolution ordering the work is in the record; but defendants introduced extracts from the minutes referring thereto, substantially similar in form to the entry in *Edwards v. Berlin*, 123 Cal. 546; which was held to be sufficient. In the assessment, however, the improvement is described as being “for laying granite curbs on Steiner, between Washington and Jackson streets, *where not already laid*, and that the roadway of said Steiner Street be paved with bituminous rock, *where not already so paved* (except that portion required by law to be kept in order by the railroad company having tracks thereon), as per contract made with the City Street Improvement Company on the 8th of January, 1896.” So in the contract, and in the notice for bids, introduced in evidence by the defendant, the work to be done is similarly described. It may be presumed, therefore, that the description of the work in both resolutions was in effect the same; and it is claimed that this was a delegation of power to the street superintendent or contractor to determine the character and amount of the work to be done. Numerous authorities are cited by the defendant, but none of them sustain his position,—all referring to cases where there was in fact a power delegated,—as, e. g., where the order directed the work “*where necessary*” (*Richardson v. Heydenfeldt*, 46 Cal. 68); or the improvement of portions of a street “not now in good and sound condition” (*Bryan v. Chicago*, 60 Ill. 507); or “such portions of the sidewalk as the city engineer shall direct” (*Thompson v. Schermerhorn*, 6 N. Y. 92¹), etc. But here nothing is left to the

discretion of the superintendent. The parts of the street to be excepted are definitely described by reference to unmistakable marks on the ground. Accordingly, precisely similar assessments have been repeatedly sustained by this court. (*McDonald v. Conniff*, 99 Cal. 388, 389; *Perine v. Erzgraber*, 102 Cal. 236, 237; *Williams v. Bergin*, 116 Cal. 59). *Bolton v. Gilleran*, 105 Cal. 244,¹ cited by appellant, was an entirely different case.

2. The contract which was put in evidence by the defendant was witnessed by the seal of the corporation and the signature, "City Street Improvement Co. By W. E. Dennison, Secty."; and it was objected that Dennison had no authority to execute it. But the plaintiff having made its *prima facie* case, the contrary is to be presumed, unless the evidence shows affirmatively that he did not have such authority; and we do not think that this is the case. It appears, indeed, from the testimony of Dennison that there was no resolution especially authorizing the execution of this contract, or authorizing the secretary, manager, or president, or other officer, to execute contracts of this kind, and no such authority is conferred by the by-laws, otherwise than it is made the duty of the secretary to "fix [the] corporate seal to all papers requiring a seal." But in the regular course of business—which involved the execution of hundreds of such contracts, and was known to the general manager and the directors—it was customary for the secretary to execute all contracts, except when absent, in which case they were executed by the general manager. From this, and from the seal attached to the contract, the authority to execute the contract is to be presumed. (Authorities cited *supra*; *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 314; *Burnett v. Lyford*, 93 Cal. 117.) It also appears that the contract was ratified by the corporation prior to the assessment, by its appeal from the original assessment. (*Oakland Paving Co. v. Rier*, 52 Cal. 276, 277.)

Another objection to the contract is, that it does not contain the provision required by section 4 of the act, that the "materials used shall comply with the specifications, and be to the satisfaction of [the] superintendent of streets." But the contract provides that the contractor will do the work "in a good and workmanlike manner, under the direction and to the satisfaction of the superintendent of streets" (describ-

¹ 45 Am. St. Rep. 33.

ing it), "in compliance with the specifications hereunto attached, and made part of this contract"; which is, in effect, the provision required. The specifications are also objected to, but we think them sufficient.

3. It appears from a printed slip attached to the assessment and from an entry in the minutes of the board, that a previous "assessment, warrant, and diagram" had, on the appeal of the contractor, been set aside and "a new assessment correcting a clerical error in making [the] former assessment" ordered; and it is objected that the order does not expressly direct a new "diagram or warrant." But this is necessarily implied in the order to correct the assessment, which, as required by the law, must be followed by a correction of the diagram and warrant, if rendered necessary by the alteration in the assessment. The objection that it does not appear that the new assessment does not conform to the decision of the board is sufficiently answered by the fact that the contrary does not appear.

4. It is objected to the validity of the lien that it does not appear that the contract was recorded in the office of the superintendent of streets, and also that the engineer's certificate was insufficient. With regard to the former point, we think the rule as established by the provision of section 12 of the act, and the authorities already cited, is, that the plaintiff's *prima facie* case is made by the introduction of the evidence specified, and consequently that it must be presumed that the duty of recording the contract imposed by the law on the superintendent was performed. The case of *Witter v. Bachman*, 117 Cal. 318, is not in conflict with this conclusion. In that case it was held that the return of the warrant had not been recorded. But there it affirmatively appeared that the return entered on the margin of the assessment was not signed by the superintendent, and the court said, distinguishing the case from the previous cases: "There was nothing in those cases to show any defect in this *prima facie* evidence. But here the return of the warrant is self-impeached by showing on its face the fatal defect." With regard to the contract (of the recording of which there was no evidence), no decision was made, the court saying, that (under the circumstances of the case) it would hesitate to hold the lack of evidence of record fatal.

Nor is there anything in the objection to the sufficiency of the engineer's certificate. A certificate of the engineer is not required, except in the case provided for in subdivision 10 of section 5 of the act. He is indeed empowered by section 34 (Stats. 1889, p. 171)—when required—to make a certificate of the work done, and where the certificate is made, it must, under the provisions of section 9, be recorded. But this provision must be construed as requiring its record only in cases where the certificate is in fact made, or is required to be made by section 5 of subdivision 10. Where the certificate is made,—otherwise than in the case provided for in the subdivision cited,—it is simply for the purpose of assisting the superintendent of streets, upon whom, by section 8, is devolved the function of determining whether the contract has been satisfactorily performed. It follows that the certificate, if satisfactory to the superintendent, cannot be defective, or in other words, that its contents are immaterial to the validity of the lien. (*Gray v. Lucas*, 115 Cal. 434 et seq.; *Jennings v. Le Breton*, 80 Cal. 13, 14; *Finlayson on Street Law*, 103.)

It is also objected to the validity of the lien that the Street-improvement Act is unconstitutional. But this point must be regarded as settled to the contrary by the decision in *Cohen v. City of Alameda*, 124 Cal. 506.

5. The objections to the demand as returned are, that the party making the return was not authorized to make the demand, and that it does not appear that in making it the person to whom the money was to be paid was specified. With regard to the latter objection, it is perhaps worthy of notice that the same defect occurs in the provision of the statute (sec. 10), which is, that the "contractor or his assigns, or some person in his or their behalf, shall publicly demand payment on the premises assessed." The reason of the defect is, that it is never necessary to express what is obviously understood, and the same reason will apply to the return. With regard to the other objection, it is sufficient to say that under the rule laid down in section 12, the authority of the party, in the absence of evidence to the contrary, is to be presumed. The fact that the demand was made as by the agent of the original contractor is immaterial. (*Taylor v. Palmer*, 31 Cal. 248, 249; *Finlayson on Street Law*, 106.)

Finally, the objection is made that the court erred in making the attorney's fee allowed a lien upon the land. But

this, we think, was plainly contemplated by the statute. The provision is, that the plaintiff may recover this in addition to costs, and have judgment therefor; and this must be construed as entitling him to the recovery of it as part of the recovery and judgment provided for, which is exclusively for a lien. Otherwise it could not be recovered. (*Taylor v. Palmer*, 31 Cal. 249 et seq.; *Manning v. Den*, 90 Cal. 610.)

I advise that the order appealed from be affirmed.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Henshaw, J., McFarland, J., Temple, J.

[Sac. No. 802. Department Two.—September 27, 1901.]

A. W. SIMPSON et al., Respondents, v. F. C. GAMACHE, Appellant; and SOUTH SCHOOL DISTRICT, etc., et al., Respondents.

BUILDING CONTRACT FOR SCHOOLHOUSE—AGREEMENT FOR PAYMENT OF MATERIAL-MEN—LIEN UPON MONEY DUE—APPEAL OF CONTRACTOR.

—A building contractor, who agreed that money due for building a schoolhouse should be applied by the school district first to pay all claims for materials furnished, and that he should receive the residue only, cannot complain of a judgment properly rendered against himself in favor of material-men, merely because the amount is made by the judgment a lien and charge upon the unpaid moneys in the hands of the school district and its trustees, from which no appeal is taken by them. The contractor cannot avail himself of technical error against defendants not appealing.

ID.—ORDER OF CONTRACTOR—EFFECT OF PAYMENT BY SCHOOL TRUSTEES.

—The contractor, having expressly ordered the trustees of the school district to pay the claims of material-men, will be discharged from further liability to the plaintiffs, who are material-men, if such trustees should voluntarily pay the judgment properly rendered against him in favor of the plaintiffs, and cannot complain of such payment.

APPEAL from a judgment of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion.

A. H. Carpenter, for Appellant.

Nicol, Orr & Nutter, for Plaintiffs, Respondents.

O. B. Parkison, for South School District and Trustees, Respondents.

CHIPMAN, C.—Action to recover the value of certain building materials furnished by plaintiffs to defendant Gamache, the contractor, and used by him in the construction of a school-house for South School District, San Joaquin County. The district and its trustees were made parties defendant; also, Masters and Thompson, who were sureties on the contractor's bond. The court gave judgment for plaintiffs, against Gamache, the school district, and its trustees, naming them, for the sum of \$419.88 and costs to suit; also, that "plaintiffs have a lien upon and charge against the sum of \$1,219.11, the sum unpaid upon the contract of Gamache, in the hands of South School District, San Joaquin County, and the trustees thereof"; and that said trustees "pay to plaintiffs, out of said sum of \$1,219.11, the sum of \$419.88 and said costs." It was adjudged that plaintiffs take nothing as to defendants Masters and Thompson. Defendant Gamache appeals from the judgment; no other defendants appeal. The court found the following among other facts: That on August 26, 1897, Gamache and the school district entered into a written agreement for the construction, by Gamache, of a schoolhouse, at the cost to the district of \$3,289, payable in installments as the work progressed. It was agreed that as installments were due they should be delivered to the clerk of the board, and he "should pay out of said installments all amounts due for materials furnished by any person to said Gamache, and that he, the said Gamache, should receive only such sum as should remain due after the payment of materials furnished by any person to him, the said Gamache." There is a finding as to the bond, but no question arises out of this feature of the case. Gamache "performed work, and furnished materials to be used, and which were used, in the construction of said building, as required by his said contract." Plaintiffs furnished materials to Gamache, at his request, which were used in the construction of the building, from time to time, between December 11, 1897, and January 20, 1898, for which

Gamache agreed to pay \$419.88, which was the reasonable value thereof. The building was fully completed February 28, 1898, and on March 24, 1898, within thirty days from the completion of the building, plaintiffs filed a verified statement of their claim with the trustees, together with a statement that the same had not been paid, and within ninety days thereafter they commenced this action. On January 20, 1898, Gamache gave plaintiffs an order upon defendant Grider, clerk of the board of trustees, for \$419.88, the amount due plaintiffs from Gamache, which was duly presented to Grider on the same day, and payment was demanded and refused. On January 29, 1898, while Gamache was performing the work required of him under his contract, the trustees of the district, against his will, entered into possession of the building, and took from him the possession thereof, and thereafter excluded and prevented him from the execution and performance of his said contract. The district paid Gamache \$1,644.50, the amount of the first two installments provided for by the contract. Thereafter the district paid \$236.50 to the Stockton Lumber Company, on the order of Gamache; also, \$78.27 for hardware provided for by the contract, and also \$10 to the Stockton Iron Works for hardware required by the contract, but no other or further payments were made, and there is unpaid of the contract price \$1,219.11. There was no failure on Gamache's part to perform his contract, nor was the district compelled, by reason of any failure of Gamache, to furnish or supply labor or materials, or do any of the carpenter or other work, and the district suffered no damage by Gamache's failure to perform his part of the contract. Such work as the trustees did after taking possession was done with the materials supplied by Gamache, or by others at his instance and request, and such materials were actually used by the trustees in completing the building..

Appellant claims,—1. That there was no privity of contract between plaintiffs and the district or its trustees, and the money for the erection of the building was due the contractor, and not plaintiffs, and the judgment ordering the money to be paid plaintiffs was, in effect, a garnishment of the district, of the public moneys in its hands, which were to be paid the contractor (citing *Skelly v. Westminster School District*, 103 Cal. 652); 2. As the materials were furnished by plaintiffs to the contractor, and not to the district,

it was error to render judgment against the district for the contractor's obligations (citing *Covell v. Washburn*, 91 Cal. 560); 3. The money that was due the contractor was public money, and plaintiffs were not entitled to a lien upon or charge against such money (citing *Mayrhofer v. Board of Education*, 89 Cal. 110.¹)

Counsel for appellant states in his brief: "The contractor, Gamache, was satisfied with the findings and judgment, excepting that portion thereof awarding judgment against the district for the amount due plaintiffs from him alone for said materials, and ordering the money due said contractor for his labor and materials to be paid by said trustees to plaintiffs, and giving them a lien upon and charge against said public moneys in the hands of the county treasurer, which otherwise would have been paid to him, and from those portions of said judgment the contractor appealed." And appellant asks that the judgment be modified, discharging the lien on the money, and also the order directing payment to plaintiffs, and that the district be released from all liability to plaintiffs.

Gamache's contract was, that as installments became due and orders were drawn the money should be delivered to the clerk of the board and be by him paid out "for materials furnished by any person to said Gamache," and he "should receive only such sum as should remain due after the payment of the materials furnished by any person to him." The court has, in its judgment, carried out the agreement of the parties, and as neither the district nor the trustees appeal, we do not see that Gamache can complain if the judgment was unauthorized as to the non-appealing defendants. His complaint that the money which should first come to him is tied up in the hands of the district, and he is thus injured, is not well founded, since his contract was that the money should go first to pay any person who furnished to him materials for the building, and that he was to "receive only such sum as should remain due after the payment of the materials furnished by any person to him." He gave his order on the trustees to plaintiff, for the payment of the money, which order they still hold. Their failure to appeal indicates a willingness now to pay it, on the judgment of the court, and we cannot see that appellant would be injured in the slightest degree by the execution of the judgment. He does not dispute the indebtedness, nor does he deny that the amount

¹ 23 Am. St. Rep. 451.

claimed by plaintiffs is due, and should be paid out of the money against which he drew his order in favor of plaintiff. He is seeking to avail himself of alleged technical error, which, if error, can only affect defendants who do not appeal. He is in no position to raise the questions presented by him. If the district pays the judgment, as it doubtless will do, he will be discharged from further liability to plaintiffs; if the district does not pay the judgment, appellant should do so.

We can discover no merit in the appeal, and therefore advise that the judgment be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J., Henshaw, J., Temple, J.

Hearing in Bank denied.

[S. F. No. 2422. Department Two.—September 27, 1901.]

**SAN FRANCISCO PAVING COMPANY, Appellant, v.
SADIE F. FAIRFIELD et al., Respondents.**

MECHANIC'S LIENS—ESTATE OF DECEASED PERSON—POWER OF EXECUTOR—INVALID CLAIM OF LIEN—AGREEMENT OF HEIRS AND PURCHASER.—An executor has no power, without an order of court, to make a contract which would give a right to file liens upon the property of the estate; and an invalid claim of lien, based on a contract made with the executor alone, without such order, cannot be made valid by consent or agreement of the heirs to pay for the work, or by an agreement that a purchaser of the estate should assume the debt and pay for the work.

ID.—STATUTORY LIEN—ASSUMPTION OF DEBT—EQUITABLE LIEN—PERSONAL LIABILITY.—A mechanic's lien is purely statutory, and can only be acquired by compliance with the statute. The assumption of the debt for the work does not create an equitable lien, in the absence of an agreement therefor, but only creates a personal liability.

ID.—CAUSES OF ACTION NOT SEPARATELY STATED—REMEDY BY MOTION.—The objection that causes of action are not separately stated is to be made by motion, and not by demurrer.

10.—IMPROPER SUSTAINING OF DEMURRER—RIGHT TO PERSONAL JUDGMENT—PARTIES.—Where the complaint in an action to foreclose a mechanic's lien shows an invalid claim of lien, but also shows a right to a personal judgment against a purchaser of the property and her husband, who, in consideration of the purchase, had agreed and promised to assume and pay the amount of the claim, and who were proper and necessary parties to the foreclosure suit, it is error to sustain a demurrer to the entire complaint. Although the foreclosure may be denied, the personal action may proceed against those parties.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward A. Belcher, Judge.

The facts are stated in the opinion.

Reed & Hankins, and H. K. Eells, for Appellant.

McKinstry, Bradley & McKinstry, for Respondents.

CHIPMAN, C.—Foreclosure of mechanic's lien. The notice of lien referred to in the complaint states: "That at the time the contract herein referred to was signed, and at the time the work herein was commenced, the estate of George F. Sharp, deceased, and the heirs of the estate of George F. Sharp, deceased, were the owners of said premises; that thereafter, and during the progress of the work herein described, John Hunt, as executor of the estate of George F. Sharp, deceased, conveyed a portion of the said premises to Sadie F. Fairfield, and as part of the consideration of the said conveyance Sadie F. Fairfield and Marshall Fairfield agreed to pay for the said work, then in progress, and concerning which this claim of lien is made"; that by said conveyance the Fairfields became, and ever since have been, and now are, the owners of a certain portion (description given) of the premises alleged in the notice as belonging to the estate, for the improvement of which the contract was entered into; "that said contractor has, at the request of John Hunt, as executor of the estate of George F. Sharp, deceased, improved the street in front of said lot of land," etc., being the premises belonging to the estate, part of which was subsequently conveyed, as aforesaid, to the Fairfields. It is alleged that the contract was as follows: "Said John Hunt, as executor of the estate of George F. Sharp, deceased, entered into a written contract with said contractor, whereby it agreed to perform for said John Hunt, as executor of the

estate, the work," etc. (describing it); "and the said John Hunt, as executor, . . . and on behalf of said heirs, devisees, and owners, promises to pay to said contractor" (then follow the prices for the various kinds of work.) It is stated that the work was done and the materials furnished between March 9, 1899, and July 10, 1899. In the statement of the demand appear the names of the Fairfields, names of certain persons as heirs of George Sharp, John Hunt as executor, "to the San Francisco Paving Company, debtor, \$846.41."

The complaint alleges that the defendants, the Fairfields, have been, since June 27, 1899, the owners of the part of the estate premises described in the notice of lien. The allegation as to the contract of John Hunt, as executor, is broader than in the notice: It is alleged on information and belief that "he requested the plaintiff to do the work and furnish the material therefore, . . . both as such executor and pursuant to an express direction and authorization of the heirs and devisees and owners of said lot of land, and on their behalf, as their agent, entered into a written contract with Flinn & Treacy, a copartnership, for the performance of the same." In stating the terms of the contract it is further alleged, that said Hunt, both as executor and on behalf of said heirs, devisees, and owners, entered into a written contract with said Flinn & Treacy, whereby they agreed to perform the work and furnish the materials, "where not already constructed in front of said premises"; and further, "the said John Hunt, as executor, . . . and on behalf of said heirs, devisees, and owners, promised to pay said contractor . . . for the work done in front of said premises, upon the completion thereof." The assignment of the contract by Flinn & Treacy to plaintiff is alleged, and that plaintiff performed the work, completing the same July 10, 1899. It is then alleged that on May 18, 1899, the Fairfields made a written offer to purchase the said premises from the estate of Sharp, deceased, in which it was stated: "I hereby offer to pay for said property, . . . and also the taxes for the present year, and the cost of street-improvements completed in front of said property, subject to confirmation by the superior court," etc.; and it is alleged that at that time the work was in progress; that the said offer was accepted, the sale was confirmed, and the deed made by the executor, June 27, 1899, "and it was recited in said conveyance that it was subject to the lien for the said street-work herein mentioned." It is then alleged that on

June 27, 1899, when said deed was made, "it was mutually agreed between said John Hunt, as executor as aforesaid, one J. J. Flinn, representing the San Francisco Paving Company, plaintiff herein, one Wm. Sharp, representing the heirs to the estate of George F. Sharp, deceased, the said Marshall Fairfield and Sadie F. Fairfield, and one M. F. Vandall, as attorney for the German Bank, having a mortgage upon the said premises, that there would be due and owing, under the terms of said contract, upon the completion of said work, to the San Francisco Paving Company, on account of the street-work in front of said premises, for which this lien is sought to be foreclosed, the sum of \$847.00, and it was agreed amongst all the said parties that the said Marshall Fairfield and Sadie F. Fairfield, in pursuance of their said bid herein referred to, and the conveyance hereinbefore referred to, then about to be made, that the said sum which would become payable to the San Francisco Paving Company under the terms of said contract be transferred to said Marshall Fairfield and Sadie F. Fairfield, and be assumed by the said Marshall Fairfield and Sadie F. Fairfield, to all of which the said Marshall Fairfield and Sadie F. Fairfield then and there agreed, and promised to pay the said \$847.00 to the said San Francisco Paving Company, upon completion of the said contract." The complaint then sets forth the facts as to filing the notice of lien, the purport of which has already been stated. Plaintiff demands judgment against defendants, the Fairfields, for the amount, of the work, interest from June 27, 1889, cost of verifying, filing notice of lien, attorney's fees, and costs of action, and "that all said sums be adjudged a lien against the premises; that said premises may be sold," etc.

Defendants demurred, on the ground of insufficiency of facts; for uncertainty, in that it does not appear what were the terms or conditions of the alleged contract between plaintiff's assignor and the estate of Sharp, deceased; also, that it does not appear where the contract with Hunt, as executor, was executed; that several causes of action have been improperly united,—namely an "alleged action for the foreclosure of a lien on real estate is improperly joined with an alleged personal cause of action on the part of plaintiff against said defendants to recover the alleged debt of defendants." The demurrer was sustained, without leave to amend, and judgment followed for defendants, from which plaintiff appeals.

1. In their reply brief, plaintiffs state: "In our opening brief we attempted chiefly to show that our complaint stated a cause of action for personal judgment against the Fairfields, and incidentally to sustain the lien." And it is claimed that if the right to the lien appears from the face of the complaint not to exist, there are facts pleaded sufficient to show that the right to a personal judgment does exist. (Citing *Jones v. Iverson*, 131 Cal. 101.) We do not think that plaintiff has shown itself entitled to the lien prayed for.

The contract to which the notice of lien refers, and under which the work was done, and must have been nearly completed before the Fairfields got their deed, was with the executor of the Sharp estate. But it was not within the power of the executor, without an order of the court, to make a contract which would give plaintiff a right to file liens on the estate property. (*Chappius v. Blankman*, 128 Cal. 362. See also *Fish v. McCarthy*, 96 Cal. 484.¹)

The subsequent consent or agreement of the heirs could not legalize or vitalize the unauthorized act of the executor, who alone could act for the estate, as such. They might, if competent to contract, make a valid agreement, binding on them individually to pay for the work, but they could not by subsequent consent convert a void lien into a valid one. Neither the executor nor the heirs could authorize the lien pending administration of the estate.

Nor can the alleged agreement of the Fairfields to pay for the work authorize the foreclosure of the lien, which was based on a contract with the executor alone. Like the heirs, the Fairfields could agree to pay for the work, but such agreement would not authorize a lien which rests on the notice of demand. It was held in *Malone v. Big Flat etc. Co.*, 76 Cal. 578, that the plaintiff can recover only upon the contracts stated in the notices of lien.

If it be true, as plaintiff claims, that it had a valid right to initiate a lien for the work done after the Fairfields became the owners, plaintiff should have given the statutory notice of such lien. The right to such a lien did not "validate the whole lien," as is urged, nor, in itself, create the lien, which is purely statutory, and can be acquired only by observing the statute.

¹ 31 Am. St. Rep. 237, and note.

Nor is it true, as claimed, that because the Fairfields assumed the entire debt, the complaint may be treated as the foreclosure of an equitable lien. There was no agreement, express or implied, on the part of the Fairfields, to create a lien. Plaintiff seeks only the foreclosure of a mechanic's lien, and no such lien is shown as to them. *Kreling v. Kreling*, 118 Cal. 413, has no application. Neither is there any estoppel of the Fairfields to deny the lien, because they have not been disturbed in their possession.

On no ground can we perceive that the lien can be enforced, and as to that part of the complaint the demurrer was properly sustained.

2. Respondents contend that it is now too late for plaintiff to claim abuse of discretion in sustaining the demurrer without leave to amend, for the reason that the record fails to show that plaintiff asked and was refused permission to amend. (Citing *Buckley v. Howe*, 86 Cal. 596; *Smith v. Taylor*, 82 Cal. 533; *Burling v. Newlands*, 112 Cal. 499; *Prince v. Lamb*, 128 Cal. 130.)

We do not think it necessary to decide when the overruling of a demurrer without leave to amend would be regarded as an abuse of discretion. The demurrer to the entire complaint was sustained. This, we think, was error, for the reason that there are, in our opinion, sufficient facts alleged to constitute a cause of action for a personal judgment against the Fairfields, which may be tried without further amendment of the complaint. It is clearly stated that they purchased a part of the property under an offer to pay "the cost of street-improvements completed in front of said property," and it is alleged that when the deed was about to be delivered to them, and in pursuance of their bid, and the conveyance about to be made, all the parties in interest met, and it was agreed that the sum which would become payable to plaintiff, "under the terms of the contract be transferred to said Marshall Fairfield and Sadie F. Fairfield, and be assumed by the said Marshall Fairfield and Sadie F. Fairfield, to all of which said Marshall and Sadie Fairfield then and there agreed, and promised to pay the said \$847.00 . . . upon the completion of the said contract." For the purposes of the demurrer this agreement will be presumed to have been in writing, if it was such agreement as comes within the statute of frauds.

Respondents demurred on the ground that there is a misjoinder of causes of action,—that is, an action to foreclose a lien against the owner, and an action to recover a personal judgment against the grantee of the owner, who has assumed the debt and agreed to pay it. Under our practice the contractor may be made a party defendant in an action against the owner to foreclose the lien (*Giant Powder Co. v. Flume Co.*, 78 Cal. 193; *Wood v. Transit Co.*, 107 Cal. 500; *McMenomy v. White*, 115 Cal. 339); and the grantee of a mortgagor who has assumed the mortgage debt, in an action to foreclose against the mortgagor, may be made a party, and a deficiency judgment will be entered against the grantee. (*Hopkins v. Warner*, 109 133.) One of the reasons for allowing this union of legal and equitable remedies in such cases is to avoid a multiplicity of suits. The Fairfields were both proper and necessary parties in the foreclosure suit, and we can see no reason why the personal action may not proceed against them, although the foreclosure must be denied. The point made by respondents does not go to the objection that the causes of action are not separately stated. This objection is to be made by motion, and not by demurrer. (*City Carpet etc. Works v. Jones*, 102 Cal. 506.)

The judgment should be reversed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. McFarland, J., Henshaw, J., Temple, J.

[L. A. No. 849. Department Two.—September 27, 1901.]

**WILLIAM H. PETTIBONE, Respondent, v. LAKE VIEW
TOWN COMPANY, Appellant.**

CORPORATIONS—EXECUTION OF CONTRACT—AGENCY FOR SALE OF LANDS
—**AUTHORITY OF PRESIDENT—ACTING MANAGER.**—The president of a corporation engaged in selling lands, who, by general resolution of the board of directors, was authorized to make conveyances, and who was manager in fact of its business, and habitually executed contracts for the corporation, without objection from any member of the board of directors, was authorized to bind the corporation by a contract executed by him in the name of the corporation, as president, constituting the plaintiff the exclusive agent of the corporation for the sale of its lands in certain counties, and requiring of him the performance of other services.

ID.—ACTION UPON CONTRACT—SALE OF LANDS—STATUTE OF FRAUDS.—In an action for services rendered under the contract for the agency to sell lands, the statute of frauds is no defense. No authority was given to the agent to execute conveyances, and even if he could not make a valid contract of sale to bind the corporation, it would be no defense to the action for services rendered to the corporation, for which it had the power to contract.

ID.—UNEXECUTED CLAUSE APPENDED—CONTRACT NOT INCHOATE.—An unexecuted clause appended to the executed contract, after the signatures thereto, purporting to be an agreement by another corporation to pay for one half of the plaintiff's services, does not make the contract for full payment thereof, made between the parties who executed it, inchoate or incomplete.

APPEAL from a judgment of the Superior Court of Riverside County and from an order denying a new trial.
J. S. Noyes, Judge.

The facts are stated in the opinion.

Smith, McNutt & Hannon, for Appellant.

Collier & Evans, for Respondent.

HAYNES, C.—Action to recover for services rendered under an alleged contract. The plaintiff had findings and judgment, and the defendant appeals from the judgment and an order denying a new trial.

The defendant is a corporation organized under the laws of this state, and having an office in Chicago, under the charge of F. E. Brown, who was a director and the president

of it. The business of the corporation was the sale of town lots and other lands in southern California. Plaintiff was, at the date of said contract, and prior thereto, a resident of Chicago, and the contract under which the plaintiff rendered services was made in that city on November 29, 1897. The contract is in writing, and is set out in full in the findings. It constituted the plaintiff its exclusive agent for the sale of lands in the counties of Riverside, San Bernardino, and Los Angeles, on a salary of seventy-five dollars per month, and certain commissions, the term of service to be three months commencing December 1, 1897, and to continue thereafter until terminated by a sixty-days' notice, in writing, by either party to the other.

1. The principal question relates to the execution of the contract by the corporation. It is signed thus: "Lake View Town Company, by F. E. Brown, President."

The court found that no resolution was passed by the directors of said corporation authorizing the execution of said contract; that the matters and things contained therein are all authorized by the articles of incorporation to be done and performed by said corporation, and are matters within the ordinary course of its business; that on and prior to the date of said contract, and from thence until the date of the trial, said F. E. Brown was the president and general manager of the business of the corporation, and personally conducted it, and, as such president and general manager, had full authority to execute said contract. These findings are fully sustained by the evidence. Upon cross-examination, Mr. Brown, the president, testified that the corporation commenced active business in May, 1897; that there was a general resolution authorizing him to make conveyances; that he executes deeds, makes land contracts and delivers them and collects the money, and has been doing so ever since they had been carrying on the business, and submits monthly statements to the secretary; that he thought they had no general manager, but admitted that he did the whole planning and work of the company, and as a matter of fact managed the business ever since it began, and that there had been two or three meetings of the directors since the contract with plaintiff was made. No intimation is given that any objection was made by the board of directors, or by any one, to the contract in question, or to any of the acts of the president in the conduct of the business of the corpora-

tion. That the president of this corporation had the power to bind it by the contract in question is sustained by *Crowley v. Genessee Mining Co.*, 55 Cal. 273; *Streeten v. Robinson*, 102 Cal. 542; and *Bates v. Coronado Beach Co.*, 109 Cal. 162. For numerous cases in other jurisdictions which cite and follow *Crowley v. Genessee Mining Co.*, 55 Cal. 273, see 3 Notes on California Reports, under that case.

Besides, this corporation seems to have been a family affair. Mr. Brown testified that his wife held about seventy-five per cent of the stock, one of his sons two or three shares, another son one or two shares, his daughter two or three, his brother a few shares, and his interest was "one share and his salary." He and his brother were directors, two other directors had one share each, and the fifth director had a few shares. The principal office was at Chicago.

It is safe to assume that the wife and children had confidence in the husband and father, who was also a man of large experience in corporate affairs, having, as he testified, "organized over thirty companies."

Appellant contends, however, that Brown had no authority to execute this contract for the corporation; that whatever authority he may have had as president and business manager of the company, it could not include the authority to execute a contract of this character; and cites subdivision 5 of section 1624 of the Civil Code, which provides, among other things, that an agreement "for the sale of real property, or for an interest therein, . . . if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged." The authority of the plaintiff, as the agent of the corporation, is in writing, and besides, there is here no question between a purchaser who seeks to enforce against the corporation a contract made with Pettibone as its agent. But, however that may be, the contract with the plaintiff was the contract of the corporation itself. The contract here involved is for the personal services of the plaintiff. It does not purport to give him authority to make conveyances, and even if it were conceded that he could make no contract for the sale of lands that would be binding upon the corporation, it would constitute no defense to the action. He executed such powers and performed such services as were given and required by the contract, and it does not appear that any of these were *ultra vires*.

But the contract included the performance of other services by plaintiff. He was to furnish "suitable advertisement of said lands" in the daily papers at Riverside, Redlands, and Los Angeles during the life of said agreement; and he was also to "devote a reasonable time to showing over the tract those parties visiting Lake View, who have already purchased."

2. It is further contended by appellant that the document or contract in question was inchoate and incomplete because it was not executed by the L. P. Hansen Company.

Below the signatures of the corporation and the plaintiff to the contract in question, there was written the following:—

"The L. P. Hansen Company hereby agrees to the employment of Mr. Wm. H. Pettibone as specified in above agreement, and will pay him \$37.50 per month, and one half of such other expenses as may be approved of and agreed to by Col. L. P. Hansen; if services of said Wm. H. Pettibone are entirely satisfactory to said L. P. Hansen Co., the said company will continue this agreement indefinitely. Said company will also pay said Wm. H. Pettibone the commissions due from it, as provided in fourth section of above agreement.

"L. P. HANSEN COMPANY,
"By ———, President."

The court found that said added clause was not part and parcel of the agreement between plaintiff and defendant, and appellant specified that such finding is not justified by the evidence.

That appellant hoped, possibly expected, the Hansen company to join in the employment of plaintiff, and thus reduce its obligation to pay a monthly salary of \$75 to \$37.50 is probable; but it was not provided that the agreement executed and delivered by the Lake View Town Company to and with the plaintiff should depend upon that or any other contingency. Said contract was made on November 29, 1897, at the city of Chicago, where plaintiff then resided, and plaintiff's salary was to commence on the second day thereafter, and the plaintiff immediately removed to California and entered upon the performance of his contract, and the court further found that this employment continued until terminated by the written notice provided for in the contract, on May 15, 1898. The plaintiff testified that when "that attachment" was put on the contract he objected, and Mr. Brown said, "This is none of your affair. This is between Colonel Han-

sen and myself. If I can get him to pay half of it, that is my affair." The clause in the contract that compensation for extraordinary expenses should be such only "as are approved of and agreed to by Col. L. P. Hansen," is not inconsistent with plaintiff's contention. Brown remained in Chicago, and the plaintiff came to California, where his contract was to be performed, and it is in no way inconsistent with the sole liability of defendant that the power of its agent to incur "extraordinary expenses" should have the approval of some third party in whom Brown had confidence. But if, as contended by appellant, it was intended to be the joint contract of the Lake View Town Company and the L. P. Hansen Company, why was not the contract so written? If the contract was "inchoate," and was not intended to be obligatory upon appellant unless assented to by Hansen, there could be no reason for not making it, upon its face, the joint contract of the two corporations. The very form of the contract shows conclusively that appellant intended to be bound in any event. It expressly provided "that the party of the first part agrees to pay the party of the second part, for his services, seventy-five dollars per month," etc. But aside from what seems to be the obvious intention of the parties as expressed in the contract, Brown was informed by letter from Hansen, under date of December 7, 1897, that he had not signed the agreement (and there is no pretense that he ever did), yet when Mr. Brown arrived in California in January he had the plaintiff assist him in showing property, and as late as March 1, 1898, wrote the plaintiff in regard to the business, without any intimation that their relations were affected in any manner by Hansen's failure to join in the contract.

As to other points made upon the insufficiency of the evidence to justify the findings, so far as they are not disposed of by what has been said, it is sufficient to say that the evidence upon behalf of the plaintiff is fully sufficient to sustain them, and the fact that there is a conflict in the evidence will not authorize a reversal. We think, however, that the preponderance of the evidence is clearly with the plaintiff, upon all material facts.

There are thirteen specifications of errors of law assigned by appellant, the first seven of them being taken to the admission of letters written by Brown, the president of the corporation, to the plaintiff. The objection made to this evi-

dence is, that Brown had no authority to bind the corporation. The authority of the president to contract for the services of the plaintiff has already been considered. The long-continued recognition of the agency of the plaintiff by the chief executive officer is material, not only upon the question of his authority to represent the corporation, but is also cogent evidence in rebuttal of Brown's testimony that there was no contract for his services, Hansen having failed or refused to execute it.

As to the letters written by Mr. Balgarnie to the plaintiff, it is sufficient to say that they related to the sale of the lands of the corporation, making suggestions and giving information about Eastern parties coming to purchase lands, and plaintiff testified that Mr. Brown told him to regard anything coming from Mr. Balgarnie as coming from himself. If it be conceded that they should have been excluded, the error in admitting them was harmless.

Upon his examination in chief, plaintiff was asked by his counsel, "What was the value of your time a month, during the time you were at Lake View?" Defendant objected, upon the ground that the complaint was not based upon that theory, and that it was not within the issue. This objection was overruled and defendant excepted. The witness answered, "Four hundred dollars a month." Defendant moved to strike out the answer, and this motion was denied. This was error. The findings and judgment, however, were based upon the contract, and were clearly within the issues, and conclusively show that both findings and judgment were unaffected by the evidence objected to. The judgment should therefore not be reversed because of that error. The sum of \$206.25 found to be due in addition to the salary, was based upon the clause in the contract allowing commissions upon sales, and damages for failure of defendant to furnish lists and prices, whereby plaintiff was prevented from making sales that he otherwise would have made.

No other points require notice. I advise that the judgment and order appealed from be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Henshaw, J., Temple, J.

[Sac. No. 931. Department One.—September 28, 1901.]

In the Matter of the Estate of GEORGE W. CAMP, Deceased. W. H. CAMP, Appellant. DAVID BONHAM, Administrator, et al., Respondents.

PROBATE OF MUTILATED WILL—CONSTRUCTION OF CODE—REMEDIAL PROVISION.—Section 1339 of the Code of Civil Procedure, relative to the probate of a lost or destroyed will, is remedial in its nature and is to be liberally construed, as applying to the probate of a mutilated will, some of the provisions of which have been destroyed.

ID.—TESTIMONY OF TWO CREDIBLE WITNESSES—SUBSTANTIAL AGREEMENT—DIFFERENCE AS TO LANGUAGE.—The requirement that the destroyed provisions must be "clearly and distinctly proved by at least two credible witnesses," does not import that they shall reproduce the exact language of the testator; and if their testimony agrees respecting the substance of the destroyed provisions of the will, those provisions may be established, though the witnesses may differ in their remembrance of the exact language used.

ID.—MUTILATED OLOGRAPHIC WILL—SIGNATURE OF TESTATOR.—Where a portion of an olographic will was torn off, including the final signature of the testator, and the substance of the destroyed contents was clearly proved by two credible witnesses, and one competent witness proved that its contents were wholly in the handwriting of the testator, and the initial clause thereof showed that it was intended to be a last will, and contained the name of the testator, the will was properly established. The writing of the name of the testator in the initial clause of the olographic will was, of itself, a sufficient signature.

APPEAL from a judgment of the Superior Court of Kings County admitting a will to probate, and from an order denying a new trial. William O. Minor, Judge.

The facts are stated in the opinion of the court.

Dixon L. Phillips, and H. P. Brown, for Appellant.

A. G. Park, for David Bonham, Administrator, Respondent.

R. Irwin, and Hudson & Pryor, for W. M. Thomas, Respondent.

HARRISON, J.—A document was presented to the superior court of Kings County, accompanied by a petition setting forth that the above-named decedent had died, leav-

ing an olographic will, of which the said document was a portion, but that since his death said will had been mutilated and a portion thereof destroyed by some person unknown to petitioner, by tearing therefrom a portion of the sheet of paper upon which it had been written. The petition also set forth what was claimed to have been the contents of the portion torn from the document, and asked that it be established as a portion of his will, and that the said will be admitted to probate. Issues were joined upon the allegations of this petition, and upon the trial thereof the court found in accordance with the petition, and made its certificate, setting forth the provisions of the document as originally made by the deceased, and admitted the same to probate. From this order the present appeal has been taken.

The document presented to the court purports to be the last will of the above-named decedent, and contains certain testamentary directions. The third item of these directions, so far as the same is found upon the first page of the document as presented, is as follows:—

"3. That all of my estate, both real and personal, (after all of my debts shall have been paid,) shall—" The remainder or bottom of this sheet had been torn off, but upon the opposite side, and beginning at the top of the page, followed these words: "to share equally and alike, in the following manner: should my wife, Hannah Camp, be living at the time either of my children arrives at maturity, then said child shall have and receive one half of its share in said estate set apart and delivered to her or him, and the other half or his or her share shall be delivered at the death of said Hannah Camp to him or her." The document, as presented to the court, had no signature of a testator, and the second page thereof ended with the words, "in the name," just above the portion that had been torn therefrom.

It was shown by the testimony of competent witnesses that the document before the court was wholly in the handwriting of the deceased, and that a few days after his death, his widow had shown it to the witnesses, Bonham and McQuiddy, and that they had then examined and read it. Each of these witnesses testified that when it was thus shown to him, no part of the paper had been torn off, but that a portion had been since that time torn from the paper, and that the portion thus removed was wholly in the handwriting of the deceased. The testimony of both was to the effect that in its form when first shown to them it was about two

inches longer than at present, and contained a provision for the disposition of the property, and had appended thereto the signature of the decedent, and that the whole thereof, including the signature, was in his handwriting. The court subsequently struck out the testimony of the witness Bonham, to the effect that the instrument was in the handwriting of the deceased, upon the ground that he was not shown to be competent to give such testimony; but the testimony of McQuiddy upon this point was competent, and was sufficient to establish this fact. The finding of the court was to the effect that the document was entire and un mutilated at the death of the testator, and that it was wholly written, dated, and signed by him, in his own handwriting, as and for his last will and testament; that after his death a portion of the bottom of the sheet of paper upon which it had been written had been torn off and destroyed, and that the provision of the portion so destroyed was, that all of his estate, both real and personal, after all of his debts should be paid, "should go to his wife, Hannah Camp, during her life, and at her death should go to their children, Pearl Camp and Lee Camp; that on the opposite and last page of the sheet upon which said will was written, and at the bottom thereof, the name of G. W. Camp was subscribed by himself."

The witnesses Bonham and McQuiddy, in giving their testimony concerning the contents of the portion torn off, did not coincide in their statement of the language used by the testator, and upon this ground the appellant contends that the court was not authorized to make the finding which it did of the provision which the instrument originally contained.

Section 1339 of the Code of Civil Procedure provides: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." This provision of the code, being remedial in its nature, is to receive a liberal construction, and is held to apply as well to a mutilated will, or one in which some of its provisions have been destroyed. (*Hook v. Pratt*, 8 Hun, 102.) The above section does not require that the witnesses shall reproduce the exact language of the testator, but that the "provisions" of the will shall be "clearly and distinctly proved." If their testimony respecting the

contents of the lost portion of the will coincides as to the provisions therein made by the testator, the court is authorized to establish such provisions as a portion of the will, even though the witnesses may differ as to their remembrance of the exact language used by the testator. Thornton, in his treatise on Lost Wills, says (sec. 108): "It is enough to prove the substance of the will, without proving the precise statement of the language or terms used in it."

In *Jones v. Cawler*, 139 Ind. 382,¹ that court said, with reference to the sufficiency of the petition: "To require that a copy of the will, or the language of the bequests in detail, should be pleaded, where no copy has been preserved, and where the memory of witnesses does not hold the exact words, would not only deny the substance for mere form, but would offer a premium upon the rascality of one whose interests might suggest the destruction of the will"; and in answer to the contention that the findings must establish the exact words of the will, said: "We have said, upon the demurrer to the complaint, that the substance is sufficient where the exact words cannot be established, and more certainly in findings cannot be required, than is required in pleading or in evidence." (See also *McNally v. Brown*, 5 Redf. 372.) In jurisdictions where the contents of a lost will may be proved by a single witness, it is held that such witness is not required to repeat the exact language of the instrument. (*Allison's Devises v. Allison's Heirs*, 7 Dana, 90; *Skeggs v. Horton*, 82 Ala. 352; *Anderson v. Irwin*, 101 Ill. 411; *Burls v. Burls*, L. R. 1 Pro. & D. 472.) A notable case in which this rule was applied was that of the will of Sir Edward Sugden. (*Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154.) Under the reason of this rule a different remembrance of the exact language of the will by different witnesses would not take away the right to have the provisions of the will established, which are supported by the language told by each of them and are consistent therewith.

The testimony of each of the witnesses herein was to the effect that the disposition of his property made by the testator in the missing portion of his will was in favor of his wife during her lifetime, and for their children after her death. The testimony of the witness Bonham was more concise than that of McQuiddy, and the finding of the court

¹ 47 Am. St. Rep. 274.

corresponds more closely to this; but, although McQuiddy does not give the same language as does Bonham, and himself states the same in different forms, there is no contradiction between them as to the substance of the testator's provision for this disposition of his property. The property disposed of, the persons in whose favor the disposition was made, and the extent of the disposition in favor of these persons, were the same.

That the document was intended by the testator to be his last will is fully established by the initial clause thereof, and the writing by him of his name in that clause was itself a sufficient signature. (*Estate of Stratton*, 112 Cal. 513.)

The finding of the court that the deceased left surviving him two children, Pearl Camp and Lee Camp, is fully sustained by the documents relating to their adoption, which were introduced in evidence.

The judgment and order are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 780. Department One.—September 30, 1901.]

W. W. GARTIWAITE et al., Executors, etc., Respondents,
v. BANK OF TULARE, Appellant.

CHECK—ORDER DRAWN UPON ONE BANK BY ANOTHER—DISHONOR—ACTION AGAINST DRAWER.—An order drawn upon a bank is a check, though drawn by another banker; and if such check is dishonored by the bank upon which it is drawn, an action lies in favor of the owner of the check, or his assignee, against the bank which drew the check.

ID.—PURCHASE OF CHECK TO PAY DEBT—MISCARRIAGE—PAYMENT TO FORGER—OWNERSHIP BY PURCHASER.—Where the check sued upon was purchased by a debtor of the payee, and mailed to him, to be collected by him and applied upon his indebtedness, but the payee never received it, and it was paid upon a forged indorsement to another person, such payment gave the drawee no right to retain the check, or to claim reimbursement from the drawer, but the check remained the property of the purchaser.

ID.—DEMAND BY PAYEE—AGENCY FOR PURCHASER—NOTICE OF DISHONOR—LIABILITY OF DRAWEE.—A demand by the payee, upon the bank upon which the check was drawn, was, in legal contemplation,

made by him as agent for the purchaser, and its refusal to pay, while the check was wrongfully retained in its possession, was a dishonor of the check, and notice of such dishonor, given to the bank which drew the check, fixed its liability to the purchaser, or his assignee, for the money originally paid for the check, which may be enforced at any time within the statute of limitations.

ID.—DUTY OF DRAWER AFTER NOTICE—NEGLIGENCE—INSOLVENCY OF DRAWEE—LOSS OF DRAWER.—Upon receiving notice of dishonor, the bank which drew the check should either demand the return of the check or the return of the money; and where it neglected to do either, it must bear any loss occurring through intervening insolvency of the drawee, after the liability of the drawer was fixed.

ID.—BURDEN OF PROOF—GENUINENESS OF CHECK—PROOF OF FORGERY.—In assuming that the drawee properly paid the check, the drawer must prove the genuineness of its indorsement; and where the indorsement was shown at the trial to be a forgery, the liability of the drawer to repay the money received from the purchaser of the check is established.

ID.—LIABILITY OF DRAWER FOR INTEREST.—The liability of the drawer of the check is the same as that of a first indorser of any other negotiable instrument, and, under the provisions of section 3116 of the Civil Code, construed with section 3177 of the same code, the court was justified in awarding interest upon the check from its date.

ID.—ACTION BY EXECUTORS—EVIDENCE—LETTERS TESTAMENTARY.—In an action by executors, the introduction in evidence of the letters testamentary is sufficient evidence of the death of the party entitled to sue, and of an order appointing the plaintiffs as his executors.

ID.—PRODUCTION OF CHECK AT TRIAL—EVIDENCE—NON-PAYMENT.—The production of the check at the trial, without any genuine indorsement thereof by the payee, is sufficient evidence that it was not paid to him, in the absence of evidence showing such payment.

ID.—REFUSAL TO DISMISS ACTION—APPEAL—ORDER NOT INVOLVING MERITS.—An order refusing to dismiss an action is not itself appealable, and where it does not involve the merits of the action, or necessarily affect the judgment rendered therein, or affect any substantial rights of the defendant, it will not be reviewed upon appeal from the judgment, and cannot constitute such error as to justify a reversal of the judgment.

ID.—DEMURRER—MOTION TO DISMISS—DISCRETION.—Where a demurrer was interposed to the complaint, and a motion was made to dismiss the action for want of prosecution, it was in the discretion of the court to refuse to hear the motion to dismiss, and to hear the demurrer. Its determination to hear the demurrer was, in effect, a denial of the motion to dismiss, and the subsequent refusal of the court to allow the motion to dismiss to be renewed was matter of discretion, which is not reviewable upon appeal.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

J. W. Davis, and Bradley & Farnsworth, for Appellant.

The responsibility of the drawer of the check ceased on account of failure to present it to the drawee for payment within a reasonable time. (2 Daniel on Negotiable Instruments, sec. 1590; *Ritchie v. Bradshaw*, 5 Cal. 229; Civ. Code, sec. 3213.)

John Yule, William W. Cross, and John M. Poston, for Respondents.

The instrument sued upon is a check, being drawn upon a bank. (Civ. Code, sec. 3254); and it is none the less a check because drawn by a bank. (5 Am. & Eng. Ency. of Law, 2d ed., p. 1030, title "Checks"; *State v. Vincent*, 91 Mo. 662; *Bull v. Bank of Kasson*, 123 U. S. 105, 110.) The forged indorsement of the check passed no title. (*Hatton v. Holmes*, 97 Cal. 208, 212; *Citizens' National Bank etc. v. Importers and Traders Bank etc.*, 119 N. Y. 197; 1 Randolph on Commercial Paper, sec. 166; *Graves v. American Exchange Bank*, 17 N. Y. 205; *Indiana National Bank v. Holtsclaw*, 98 Ind. 85; *Cochran v. Atchison*, 27 Kan. 728.) So long as the drawee bank remained solvent, when demand was made and notice of dishonor given, the drawer's liability becomes thereby fixed, though months or years may have elapsed since the check was drawn. (2 Daniel on Negotiable Instruments, 4th ed., sec. 1589.)

HARRISON, J.—The complaint herein alleges that on January 31, 1890, J. O. Lovejoy purchased from the defendant its check upon the Pacific Bank, at San Francisco, for the amount of \$750, payable to the order of B. F. Smith, and paid to it therefor the sum of \$750. Lovejoy at that time was indebted to Smith in an amount larger than the amount of the check, and on the same day sent the check by mail, directed to Smith at Oakland. Smith did not receive the check, but on February 5th it was presented to the Pacific Bank by another person, who represented himself to be the payee, and was paid to him. About the 17th of February, Smith notified the Pacific Bank of the miscarriage or loss of the check, and was then informed by the bank that it had

already been presented to it and paid, and at the same time the check was exhibited to him, with the indorsement of his name thereon. Smith thereupon pronounced the indorsement a forgery, and demanded of the bank that it deliver the check to him, or pay to him its amount. His demand was refused, and he immediately notified Lovejoy and the defendant herein of such refusal. July 31st, Lovejoy sold and assigned the check to Smith, together with all his claim and interest in the moneys represented thereby, and his demand against the defendant therefor. The defendant and the Pacific Bank had each due notice of this sale and assignment. Smith died in 1893, and the plaintiffs herein were appointed his executors. The check remained in the custody of the Pacific Bank until January 25, 1894, when it was delivered to the plaintiffs herein. Thereupon they again demanded its payment from that bank, which was refused, and notice thereof given to the defendant, and on January 30th a demand for its payment was made of the defendant herein, which was refused. Thereafter, on the same day, this action was commenced. The defendant filed a general demurrer to the complaint, which was overruled, and it thereupon filed its answer. The cause was tried by the court, and upon the evidence presented by the plaintiffs—the defendant offering no evidence—the foregoing facts were found, and judgment rendered in favor of the plaintiff. From this judgment and an order denying a new trial the defendant has appealed.

Stated in concise form, the facts alleged in the complaint show that on January 31, 1890, Lovejoy paid to the defendant the sum of \$750 in consideration of its agreement—evidenced by its check—that the Pacific Bank would pay the same to B. F. Smith upon his demand therefor; that upon Smith's demand the Pacific Bank refused to make the payment, and that the defendant had due notice thereof. The action is brought by the representatives of Smith, to whom Lovejoy had assigned his claim against the defendant, for this breach of its agreement with him, to recover the amount of money so paid to it, with interest. The other allegations in the complaint, and facts found by the court, are merely matters of inducement, explanatory of these essential facts, and establishing the connection of the plaintiffs with the cause of action originally vested in Lovejoy.

The instrument which Lovejoy received from the defendant was drawn by it upon a bank, and is therefore a check. (Civ. Code, sec. 3254.) It is none the less a check, though drawn by another banker. It was drawn at the direction of Lovejoy, to the order of B. F. Smith, for the purpose of having him collect the same from the Pacific Bank and place the amount to the credit of Lovejoy's indebtedness to him. Although Lovejoy sent the check by mail to Smith, it was never received by Smith, and consequently remained the property of Lovejoy. The payment by the Pacific Bank, on February 5th, upon a forged indorsement, gave to that bank no rights against the defendant, either to retain the check, or to claim a reimbursement for the amount paid. (*Janin v. London etc. Bank*, 92 Cal. 14.¹) Smith's demand upon the bank for the payment of the check on the 17th of February was, in legal contemplation, as the agent of Lovejoy, and the refusal of the bank to pay him was a dishonor of the check. The possession of the check at that time by the bank obviated any necessity of its physical presentation by Smith. The notice to the defendant of this dishonor fixed the liability of the defendant to Lovejoy for the money originally paid by him for the check. He was not required to enforce this liability immediately, but could bring his action therefor at any time before it should become barred by the statute of limitations. When the defendant received this notice of the dishonor of its check, its proper course was to demand from the Pacific Bank either the return of the check, if it was of the opinion that it had been properly paid, or if not, of the money which it had provided for its payment. Its cashier testified that it ceased to transact business through the Pacific Bank in August of that year. In the usual course of business, there would then have been a settlement of the account between them, and the defendant would have demanded the return to it of the check, or of the money which it had provided for its payment. Instead thereof, it permitted the bank to retain the check, and did not insist upon the return of the money. If by reason of this conduct the defendant has sustained injury, it is to be borne by itself, and not by Lovejoy or his assignee. It received notice of the dishonor of the check soon after it was made, and although it appears that some correspondence in reference thereto was had between it and the Pacific Bank, it took no steps to protect

¹ 27 Am. St. Rep. 82.

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itself, but appears to have relied upon its view, as expressed in one of the letters of its cashier, that it was under no responsibility in the matter. In thus assuming that the payment by the Pacific Bank was properly made, and was a discharge of its obligation to Lovejoy, it was bound to show that the indorsement upon the check was genuine. When it appeared at the trial herein that this indorsement was a forgery, its liability for the money received by it from Lovejoy was established.

Any delay in the presentation of the check was available as a defense by it only to the extent of the injury which it had suffered thereby. (Civ. Code, sec. 3255.) But there is no claim that it had suffered any injury thereby prior to its receipt of the notice of dishonor. Its only claim of injury is contained in the allegation, in its answer, that the Pacific Bank became insolvent in 1893. Lovejoy's right of action against it had, however, been fixed long prior to that date.

Section 3177 of the Civil Code makes the rights and obligations of the drawer of the check the same as those of the first indorser of any other negotiable instrument, and section 3116 of the Civil Code declares that every indorser of a negotiable instrument warrants to every subsequent holder thereof, who is not liable thereon to him,—“4. That if the instrument is dishonored, the indorser will, upon notice thereof duly given to him, or without notice, where it is excused by law, pay the same with interest.” The action of the court in awarding to the plaintiffs interest upon the check from its date was in accordance with these provisions. By the breach of the defendant's agreement, it became liable to Lovejoy for interest upon the money from the time it had received it from him.

The introduction of the letters testamentary to the plaintiffs was sufficient evidence of the death of Smith, and of an order of the superior court appointing them as his executors. (*Dennis v. Bint*, 122 Cal. 39.¹) The production of the check at the trial, without any indorsement of the payee, was evidence that it had not been paid to Smith, and there was no evidence tending to show that it had been paid to him.

The complaint herein was filed January 30, 1894, and a demurrer thereto was filed March 19, 1894. Before any action had been taken on the demurrer, the defendant moved

the court, March 19, 1897, to dismiss the action for want of prosecution, and on March 20th its motion was granted, and a judgment dismissing the action was entered March 22d. Upon an appeal from this judgment, it was reversed (*Garthwaite v. Bank of Tulare*, 123 Cal. 132), upon the ground that certain evidence had been improperly received. Upon the going down of the *remittitur* the clerk placed the cause upon the law and motion calendar, and at the first calling of this calendar the defendant asked to have its original motion to dismiss heard, and the plaintiffs asked that the demurrer be heard. The court, after argument, entered an order denying the application of the defendant, and refused to hear its motion. When the demurrer came on to be heard, the defendant objected to a hearing thereof until the court had first disposed of the motion to dismiss. The court overruled this objection, and the defendant then asked leave to renew its motion to dismiss for want of prosecution. This motion was also denied. It is now urged by the appellant that the court erred in these rulings, and that for its errors the judgment should be reversed.

We are of the opinion, however, that the action of the court in this respect did not affect any substantial rights of the defendant, and was not such error as to justify a reversal of the judgment. The order of the court refusing to dismiss the action is not itself appealable, and upon an appeal from the judgment this court can review only an intermediate order or decision which involves the merits or necessarily affects the judgment. (Code Civ. Proc., sec. 956.) The decision on the motion did not involve the merits of the action, nor did it necessarily affect the judgment thereafter rendered.

The reversal of the judgment upon the former appeal had the effect to leave the parties to the action in the same position as they were prior to its rendition in the superior court. The motion for a dismissal of the action, and the demurrer to the complaint, were both before that court for its consideration, in the same manner and to the same extent as they were before its former action thereon, or as if they had then been presented to the court for the first time. The defendant did not have an absolute right to have its motion considered and determined before the court could take up and consider the demurrer, but its application therefor was addressed to the discretion of the court. If the court had made a formal order denying the motion to dismiss, its discretion therein

would not have been subject to review. But its determination to hear the demurrer was equivalent to a denial of the motion. Whether the court would hear the motion to dismiss, or would hear the demurrer first, when both were brought before it, was addressed to its discretion, and the exercise of this discretion, as well as its subsequent refusal to permit the defendant to renew its motion, is not subject to review. In the exercise of its discretion upon the motion of the defendant, the court was at liberty to consider the fact that the plaintiffs were at the same time seeking a disposal of the demurrer; and if it was of the opinion that the plaintiffs' motion for a hearing upon the demurrer was a sufficient answer to the claim of the defendant that they were not prosecuting the action with sufficient diligence, its discretion was properly exercised in refusing to dismiss the action.

The judgment and order are affirmed.

Van Dyke, J., and Garoutte, J., concurred.

[Sac. No. 821. Department One.—September 30, 1901.]

S. PETTERSON, Appellant, v. STOCKTON AND TUOLUMNE RAILROAD COMPANY, Respondent.

PLEADING—AMENDMENT OF COMPLAINT AT TRIAL—PARTIES—CHANGE OF ACTION—DISCRETION.—The trial court did not abuse its discretion by refusing an application to amend the complaint at the trial, so as to change the action from one against the defendant, to an action against the defendant and another party jointly, which would have been, in effect, another action, and would probably require a trial *de novo*.

AGENCY FOR CORPORATION—EVIDENCE—DECLARATIONS OF PRESIDENT—AUTHORITY NOT PROVED.—The declarations of an agent are not admissible to prove the agency; and in an action against a corporation for grading done upon a railroad, where one who became president of the corporation testified that she did the work of grading at her own expense, and on her own account, to the knowledge of the plaintiff, the evidence of her declaration, to the effect that she, in the name of the corporation, had the work done, is not admissible against the corporation, without proof of her authority to act for the corporation in that behalf.

ID.—BELIEF OF PLAINTIFF AS TO EMPLOYMENT.—The belief of the plaintiff that he was employed by a corporation defendant is immaterial in the absence of proof of some action on the part of the corporation justifying such belief.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

W. W. Middlecoff, for Appellant.

J. J. Burt, and McNoble & McNoble, for Respondent.

VAN DYKE, J.—This is an appeal from a judgment in favor of the defendant, and also from an order denying plaintiff's motion for a new trial.

The motion for a new trial was made upon a bill of exceptions, which is brought up as part of the record on the appeal.

1. The appellant claims that the findings are not supported by the evidence; but an examination of the testimony satisfies the court that the evidence is, although somewhat conflicting, sufficient to support the findings.

2. The appellant also claims the court erred in refusing permission to amend his complaint. The application to amend was made during the trial of the cause, and the amendment would have changed the action from one against the defendant, to an action against the defendant and another party jointly. It would have been, in effect, another action, and most likely a trial *de novo*. Under the circumstances, we cannot say that the court abused its discretion in denying the motion to amend.

3. In appellant's brief it is alleged that the court erred in rejecting evidence. The action is for balance on account, for work, labor, and services alleged to have been performed by the plaintiff for the defendant, and also by one H. J. Lorentzen for the defendant, who had assigned his claim to the plaintiff before the suit was brought. The alleged labor and services consisted in the grading of a railroad bed or track. The question seems to have been whether such grading was done by Annie Kline Rikert on her own behalf, or by the defendant corporation. As a witness for the plaintiff, she

had testified that the grading of what is known as the Stockton and Tuolumne Railroad Company was done by her; that she undertook it at her own expense, with the intention of afterward putting in the bills to the company or directors, and she says, "Mr. Petterson knew that I was carrying on the grading on my own account. We discussed that, and he expected to be a partner in the construction company." After the company was organized, it seems she became president of the corporation. On the trial, the court ruled against the plaintiff in attempting to show that Annie Kline Rikert stated that the defendant company was doing the work, and that she, in the name of the corporation, actually had the work done, and also that the plaintiff believed he was employed by the defendant. What she might have said could not bind the company. Agency cannot be proved by the declarations of the agent, and no agency had been shown when the ruling was made. What plaintiff believed, without some action on the part of the corporation justifying such belief, would cut no figure. There are many questions proposed, and rulings of the court, in the same line, and it is not necessary to notice them in detail. They were all attempts to bind the corporation by declarations, without showing that the party making such statements or declarations was authorized by the corporation to act in that behalf. We think the court did not err in the respect noted.

Judgment and order affirmed.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[S. F. No. 1869. Department One.—September 30, 1901.]

MARGARET A. MULLEN, Respondent, v. CORNELIUS
C. DUNN, Appellant.

ACTION UPON NOTE—INSANE DEFENDANT—SERVICE OF SUMMONS—APPEARANCE BY GUARDIAN—JURISDICTION—APPEAL.—In an action upon a note, found to have been executed by the defendant when he was competent to contract, though he was found to have been afterwards committed to an insane asylum, where it appears that the service of summons was made both upon the defendant and upon his duly appointed guardian, and that the answer was entitled in the name of the defendant, in which the guardian answered "for said insane person and for himself," the court acquired jurisdiction of the person of the insane defendant, and the judgment against him, being supported by the pleadings and findings, will be affirmed upon appeal therefrom.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Scawell, Judge.

The court found that the defendant was competent to contract when the note sued upon was executed, though subsequently committed to an insane asylum. Further facts are stated in the opinion.

Eugene F. Bert, and A. Ruef, for Appellant.

John W. Bourdette, and Andrew Thorne, for Respondent.

GRAY, C.—This is an action on a promissory note. After a trial, the plaintiff had judgment, and defendant appeals therefrom.

The single contention of appellant is, that the answer in the case was the answer of the guardian, John O. Dunn, and not the answer of the incompetent, Cornelius C. Dunn, and that there is nothing to show any appearance by or on behalf of the said Cornelius C. Dunn, or that the court ever obtained jurisdiction of his person in the case, and therefore the court had no power to enter the judgment against him from which the appeal is taken.

The defendant, as appears from the pleadings and findings, was an insane person, and his son, John O. Dunn, was the duly appointed guardian of his person and estate. It also

appears that due personal service of the summons was had upon the insane person, as well as upon the said guardian. The answer to the complaint was verified by said John O. Dunn, and in this verification he states "that he is the guardian of the person and estate of Cornelius C. Dunn, an incompetent person, and one of the defendants in the above-entitled action." In the title of the cause, both in the complaint and answer, Cornelius C. Dunn is named as a defendant, and the answer is signed, "Eugene F. Bert, attorney for defendant." The first paragraph of the answer reads as follows: "Now comes the above-named John O. Dunn, improperly sued as John C. Dunn, the guardian of Cornelius C. Dunn, an insane person, and answering the complaint of plaintiff herein *for said insane person* and for himself, avers as follows."

Section 1769 of the Code of Civil Procedure provides that every guardian "*must appear for* and represent his ward in all legal suits and proceedings." It is plain from the language of the answer that the guardian intended to *appear for* and represent his ward in the case, and that the ward appears and answers by his guardian; and thus the court gets jurisdiction of the person of the ward.

The judgment against Cornelius C. Dunn is supported by the pleadings and findings, and there is no merit in the appeal.

The judgment should be affirmed.

Smith, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in Bank denied.

[L. A. No. 816. Department One.—September 30, 1901.]

FRANK ELLIS et al., Respondents, v. H. C. WITMER
et al., Appellants.

STREET-IMPROVEMENT—ADVERTISEMENT FOR BIDS—ORDER TO READVERTISE—DESIGNATION OF NEWSPAPER.—Where the original notice for bids was properly advertised and posted, a subsequent order to re-advertise for bids, without designating any newspaper, must be construed as referring to the original order for its terms.

ID.—NECESSITY FOR READVERTISEMENT—LIMITATION OF TIME—PRESUMPTION.—A readvertisement for bids is not necessary, unless the original order limited the time for bids; and it cannot be presumed that a time was limited therefor, where it is not so made to appear.

ID.—ANTEDATED BOND FOR UNPAID ASSESSMENTS—DELAY IN MINISTERIAL ACTS.—The bonds to be issued by the city treasurer for the amount of unpaid assessments should be issued and dated at the expiration of the thirty-days' credit allowed by the Street-improvement Act from the date of the warrant; and where, by reason of delay in the ministerial acts to be performed by the city treasurer, a bond was not issued until after that date, it was properly dated as of the date when it should have been issued.

ID.—SALE UNDER DELINQUENT BOND—IRREGULARITIES—RELIEF IN EQUITY—PAYMENT OF SUM DUE.—Where it appears that the assessment and bond were valid, a sale under a delinquent bond cannot be annulled in equity for irregularities in selling under the bond for an excessive amount, or upon insufficient notice, or at an improper place, or upon a defective certificate, unless on condition of paying the sum due. Where no such condition was imposed by the court, and there is no offer in the complaint to pay what is due, a judgment annulling the sale must be reversed.

ID.—SALE FOR PRINCIPAL AND INTEREST OF BOND.—A sale for the principal and the interest of the bond to the date of sale is not for an excessive amount. The bond does not cease to bear interest after it becomes delinquent.

ID.—INSUFFICIENT NOTICE OF SALE—PERSONS DELINQUENT NOT NAMED.—A notice of sale, not conforming to the requirements of section 41 of the act of 1891, and of section 3764 of the Political Code, referred to in the Street-improvement Act, and omitting the names of the persons delinquent, is fatally insufficient. The fact that the names of the persons delinquent cannot be ascertained from the bond is not material, since they can be ascertained from the proper records.

ID.—PLACE OF SALE.—The place of sale under a delinquent bond, assuming that it was to be determined by the provisions of section 3768 of the Political Code as it stood prior to its repeal, must be "in front of the court-house, or in front of the tax-collector's of-

fice," as the board of supervisors may by resolution have directed, for all state and county taxes. The board cannot authorize such sales to be made "in the tax-collector's office."

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Lynn Helm, for Appellants.

Goodrich & McCutchen, for Respondents.

THE COURT.—Appeal from a judgment for the plaintiffs and from an order denying the defendants' motion for new trial.

The plaintiffs are the owners of a tract of land in the city of Los Angeles, described in the complaint, on which a street-assessment had been levied, and a bond issued to one Donegan, to secure the same, under the provisions of the Street-improvement Act of March, 18, 1885, as amended March 17, 1891 (Stats. 1891, p. 116), and the bond having become delinquent, the property was sold by the city treasurer, and the certificate of purchase assigned to the defendant Witmer. The suit was brought to annul the assessment, bond, and certificate of sale, and to enjoin the issue of a deed by the treasurer.

On the trial the only evidence introduced by the plaintiffs was "the stipulation of counsel that between the nineteenth day of December, 1892, and the first day of January, 1893, the city treasurer of the city of Los Angeles made out and signed said bond set forth in the amended complaint of plaintiffs, and thereafter, on the third day of January, 1893, delivered the same to the said Donegan." On behalf of the defendants, evidence was offered to the effect that on or about June 9, 1893, in an action brought by Witmer Brothers, the city treasurer was enjoined from making a sale of an undivided five-eighths of the premises assessed, pursuant to notice to the treasurer given by Donegan, March 23, 1893, and that the injunction was not dissolved until November 29, 1897. It was also stipulated, in effect, that at the time of the assessment and issue of the bond the title to an undivided five-eighths of the premises assessed stood in the name of one Sullivan, and the remaining three-eighths in the grantors of

the plaintiffs, and that the partition of the land—by which the plaintiffs became the owners in severalty of the land described in the complaint—took place after the bond was issued. This was the only evidence in the case, and it is conceded by the respondents that it was insufficient to sustain some of the findings. But it is claimed that the judgment is sustained by the admitted facts of the case, and that, as the result could not be changed on a new trial, there was no error in refusing it. The points made by the respondents are,—1. That there was no sufficient order for the publication of notice for bids; 2. That the bond . . . was invalid, because antedated; 3. That the sale was void for various reasons, and the certificate of sale invalid; and 4. That the special defense set up in the answer is insufficient, and not sustained by the evidence. The facts relating to the several points will be stated as we consider them.

1. With regard to the advertisement for bids, there were three publications, all in the Los Angeles Times. The first was under the ordinance, or an order, directing publication in that paper, and posting, and was admittedly sufficient. The others were published and posted under subsequent orders of the council, directing the clerk "to readvertise for bids" for the work. The Donegan bid was received subsequently to the last publication; and it is claimed there was no sufficient order designating the newspaper for the publication, etc., as required by section 5 of the Vrooman Act. But it is not disputed that the first order was sufficient, and—assuming that another order was necessary—the subsequent order to readvertise, we think, must be construed as referring to the original order for its terms. This is the most obvious and natural construction of the order; and no reason can be suggested why it should be so construed as to make it void. The cases cited by respondents' counsel have, therefore, no application. In none of them was there any order directing the publication. (*Meuser v. Risdon*, 36 Cal. 239; *Chase v. Treasurer etc.*, 122 Cal. 545; *Donnelly v. Tilman*, 47 Cal. 40; *Donnelly v. Marks*, 47 Cal. 187; *City of Napa v. Easterby*, 61 Cal. 509.) It may be added that, as the case is presented, it does not appear that, after the first, any other order or publication of notice was necessary. All that is required by section 5 of the Vrooman Act is that the notice should be once published. There is no provision for republication, except in the special case provided for; nor is it required that the notice should limit the time within which bids would be

received. No doubt, it was competent for the council to prescribe such limit; and, perhaps, had such a limit been prescribed, a readvertisement would have been necessary. But in the case as presented it does not appear, nor can it be assumed, that a time was limited for the reception of bids.

2. The objection to the date of the bond is untenable. Under the provisions of section 10 of the act, it is the duty of the street superintendent, upon the return of the warrant, to record it forthwith, and under the provisions of section 40, thereafter, and after the expiration of thirty days from the date of the warrant, to certify a complete list of the unpaid assessments (amounting to fifty dollars or more) to the city treasurer, whose duty it is, "thereupon," to make out and issue the bonds. Assuming the warrant to be returned within thirty days of its date, and that the officers act promptly, the bonds will be issued on expiration of the thirty days from the date of the warrant, and they must be regarded, therefore, as due on that date. Naturally, however, and often from necessity, delays will occur; and such were doubtless contemplated by the statute. But it cannot be supposed that it was the intention of the legislature that the rights of the contractor should be affected thereby. The case is therefore one for the application of the doctrine of relation, and the bond, whatever be the date of its actual issue, must be regarded as taking effect, and may therefore be dated as of the date of its proper issue. (*Gibson v. Chouteau*, 13 Wall. 101.) And this is very clearly implied in the form of the bond given in the act, which makes the interest and the term of the bond to run "from its date." Hence, in order to give effect to the assessment,—which, "with accrued interest," is declared to be a lien upon the property affected thereby,—the bond must necessarily be dated as of the date on which the assessment becomes due. This, in ordinary cases, is the date of the return of the warrant, after which it is provided that the amount unpaid shall draw interest at ten per cent per annum. (*Vrooman Act*, sec. 10.) But in the case under consideration the period for payment is extended to the expiration of thirty days from the date of the warrant, which must therefore be regarded as the date of the maturity of the assessment. In the case at bar, the date of the warrant was November 4th, and of its return, December 3, 1892; and the issue of the bond was therefore due December 5, 1892;

and though by reason of delay in the ministerial acts to be performed the bond was not made out and issued until some time afterwards, it was properly dated as of that date.

3. The sale is attacked on the grounds, that the amount for which the land was sold was excessive; that the notice of sale was insufficient; that the place of sale was not as prescribed by law; and that the certificate of sale is defective. But there is a preliminary objection that must be first considered.

The assessment and bond being valid, it appears that the plaintiffs are indebted for the amount assessed, or such proportionate part of it as may correspond to their land. This being the case, they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, unless on the condition of paying what is due from them. (*Esterbrook v. O'Brien*, 98 Cal. 671; *Quint v. Hoffman*, 103 Cal. 506; *Hellman v. Shoulters*, 114 Cal. 137; *Weber v. San Francisco*, 1 Cal. 455.) Here, no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief. The decision in *Chase v. Treasurer etc.*, 122 Cal. 540, does not conflict with this conclusion. In that case the point was made that there was no tender of the tax, and was overruled; but the ground of the decision was, that the assessment was void, and consequently there was no tax to be tendered. (*Chase v. Treasurer etc.*, 122 Cal. 544, 545.)

On this account the judgment must be reversed. But, on the case being remanded, the plaintiffs may, if so advised, amend their complaint by offering to pay into the court such portion of the tax as may be determined by the court to be due upon their land, which, as the case is now presented to us, would seem to be three eighths of the whole, though we are not to be understood as definitely determining this point. In the case of such amendment, the obligee in the bond, D. F. Donegan, or his representative, should be made a party defendant, in order that the right to the money, as between him and the defendant Witmer, may be determined. Though this will be unnecessary, if it be shown that the defendant Witmer has succeeded to the interest of Donegan in the bond. If the complaint be not amended, judgment should be entered for the defendants. In view of the conclusions we have reached, it will be unnecessary to determine the objections to

the sale, except in so far as may be proper to direct the future proceedings in the case.

The principal objection made to the sale is, that it was for an excessive amount. The sale was made by the treasurer, December 31, 1897, after a demand made on him by the contractor, December 4, 1897, the amount for which the land was sold being the principal of the bond (\$3,168.10) and interest (\$1,267.24), aggregating \$4,435.34. But a previous demand for sale had been made on the treasurer, by the contractor, March 23, 1893, and the land advertised for sale,—this being the sale referred to above as enjoined,—and the point is made by the respondents, that, under the provisions of section 41 of the act (Stats. 1891, p. 119), the bond became delinquent on the day following the first demand, March 24, 1893, and afterwards ceased to bear interest; so that the sale should have been for the principal of the bond only. But the point, we think, is untenable. The statute provides that on the demand being made, “then the whole bond, . . . with its accrued interest, shall become due and payable immediately, and on the day following shall become delinquent.” The effect of this provision is simply to make the bond due on the making of the demand, and on the following day, delinquent, leaving its terms otherwise unaffected. The obligation to pay interest therefore continues unimpaired. Nor is this conclusion affected by the remaining provisions of the section, conferring on the treasurer “the powers and duties of tax-collector, in the collection of unpaid state and county taxes,” and directing him “to proceed to advertise and sell [the land] by proceedings in all respects the same as provided by law for the collection of state and county taxes,” and making applicable to the case “all such provisions and proceedings after taxes have become delinquent, including the certificate of sale, the right of redemption, and the deed, with the respective costs thereof.” These do not refer to the obligations of the bond, which are clearly defined by its terms, but merely to the proceedings for collection by sale. The obligee of the bond was therefore entitled to a sale for the interest as well as for the principal. Nor is there anything in the point that the estimated amount of interest was too great. Interest was estimated for five years only, which, counting from the date of the bond, expired three days before the notice, and twenty-six before the sale.

With regard to the notice of sale, the principal objection

is, that it does not conform to the requirements of section 3764 of the Political Code, to which, under section 41 of the act of 1891, the treasurer was required to conform his proceedings. This objection, we think, is well taken. The provisions of the section of the Political Code cited require that the delinquent list (which, in the case of taxes, is part of the notice of sale) "must contain [among other things] the names of the persons . . . delinquent." These are omitted in the notice, and we think the omission fatal. (*Shipman v. Forbes*, 97 Cal. 572; *Simmons v. McCarthy*, 118 Cal. 622; *Cooley on Taxation*, 482 et seq.) It is true, as suggested by the appellant, that these names cannot be ascertained from the bond. But we are not at liberty, on this account, to disregard the plain language of the statute. The names of the persons delinquent could have been obtained from the proper records.

With regard to the place of sale, it does not appear from the record that it was not the right place. Assuming, as claimed by the one and admitted by the other party, that the matter is to be determined by the provisions of section 3768 of the Political Code, subsequently repealed (*Ranish v. Hartwell*, 126 Cal. 446, 447), the proper place would be "in front of the court-house, or in front of the tax-collector's office, as the board of supervisors [may], by resolution, [have directed], for all state and county taxes"; for, by section 41 of the act of 1891, it is provided that the proceedings shall be as required "for delinquent state and county taxes." But, in the absence of any resolution of the board directing at which of these places the sales should be made, it cannot be determined whether the sale was made at the right place, or otherwise. The resolution alleged in the complaint on information and belief, that sales for state and county taxes shall take place "in the tax-collector's office," was obviously beyond the powers of the board, which extended only to the choice of one or the other of the two places specified in the statute. The objections to the certificate of sale need not be considered.

The judgment and order appealed from are reversed and the cause remanded for further proceedings in accordance with this opinion.

Hearing in Bank denied.

[Crim. No. 672. In Bank.—October 1, 1901.]

THE PEOPLE, Respondent, v. BERT ROSS, Appellant.

CRIMINAL LAW—MURDER—INSTRUCTIONS—ABSENCE OF INTENTION TO KILL—REQUEST COVERED BY CHARGE.—Upon a trial for murder, it is not error to refuse an instruction applicable to the defendant's testimony, that if the jury should find from the evidence that at the time when the defendant assaulted the deceased he did not intend to kill him, they could not find the defendant guilty of murder in the first degree, where it appears that such requested "instruction was fully covered by the other instructions given in the charge of the court."

ID.—CAUSE OF DEATH—REQUESTED INSTRUCTION INAPPLICABLE TO EVIDENCE.—Where there was no evidence which would authorize the jury to find that deceased came to his death by reason of any neglect or unskillful treatment on the part of the surgeons, a requested instruction upon that subject was properly refused.

ID.—DISCRETION OF JURY AS TO PENALTY—CONTROL BY INSTRUCTION IMPROPER—REASONABLE DOUBT.—The discretion given to the jury by section 190 of the Penal Code, in determining the penalty for murder in the first degree, is to be exercised upon their own consideration of the evidence, without other instruction than to call the attention of the jury to its provision. Their discretion cannot be controlled by instructions presenting reasons for its exercise in one mode rather than another; and a requested instruction, that in case of their finding murder in the first degree, they should, in their discretion, as to fixing the penalty therefor, give the defendant the benefit of a reasonable doubt, in favor of imprisonment for life, rather than the death penalty, was properly refused.

ID.—INDICTMENT—CIRCUMSTANCES OF OFFENSE.—An indictment sufficiently charging the defendant with the crime of murder is not impaired by the manner in which the facts constituting the crime, or the circumstances under which it was committed, are subsequently stated therein.

ID.—MOTION TO SET ASIDE VERDICT—MISCONDUCT OF JURY—NEWLY DISCOVERED EVIDENCE—CONTINUANCE FOR AFFIDAVITS NOT SUPPORTED.—Where the defendant, upon an adjourned day for pronouncing judgment, moved to set the verdict aside for misconduct of the jury, and for newly discovered evidence, and asked for a continuance for a reasonable time in which to procure affidavits of witnesses upon both grounds, but presented no affidavit whatever in support of the motion, the continuance was properly refused.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

Graves & Graves, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr.,
Deputy Attorney-General, for Respondent.

HARRISON, J.—The appellant was convicted of murder in the first degree, and sentenced to suffer the punishment of death. At the trial, the evidence disclosed the following facts connected with the homicide: The defendant had been convicted of a felony in the superior court of San Diego, and sentenced to imprisonment in the state prison at Folsom, and was being taken thither upon the steamship Santa Rosa, in the custody of W. J. Ward, a deputy sheriff of that county. While the steamer was lying at the wharf at Port Harford, the defendant formed the purpose of escaping from the custody of the officer, and in pursuance thereof, while they were alone in a stateroom on the steamer, took up a water-bottle, with which he struck the officer several times upon the head, with such force as to break the skull and injure the brain, to such an extent as to render him senseless, and cause his death a few days afterwards.

The defendant was a witness in his own behalf, and testified that he struck the officer with the bottle several times with the intention of knocking him senseless, so that he might escape, but that he had no intention of killing him; that the officer was sitting in a chair when he struck him the first time; that he then jumped up and grabbed the defendant's hand, whereupon the defendant struck him again, and then pushed him back into the chair, and hit him several times after he had sat down. The defendant asked the court to instruct the jury as follows: "If you find from the evidence that at the time defendant assaulted the said Ward, he did not intend to kill said Ward, you cannot find the defendant guilty of murder in the first degree." The refusal to give this instruction is assigned as error. The court had previously instructed the jury that if they were satisfied from the evidence, beyond a reasonable doubt, that the defendant killed Ward, they "must ascertain his intent, and whether the killing was willful, deliberate, and premeditated, from the conduct of the defendant, his motive, if any he had, for committing the act, and all the circumstances con-

nected with the commission of the act, as shown by the proof," and at the request of the defendant had given the following instruction: "If the jury are satisfied, beyond a reasonable doubt, that defendant caused the death of said Will J. Ward, but that at the time defendant struck said deceased he only intended to stun him, as to enable defendant to escape from the custody of said deceased, and that said defendant did not intend to kill said deceased, you must acquit defendant of murder in the first degree." The instruction refused by the court was thus fully covered by the instructions already given, and the court did not err in its refusal. Other objections to the instructions of the court are assigned as error, but the instructions, as a whole, are fully as favorable to the defendant as, under the evidence, he was entitled to have given to the jury.

There was no evidence before the jury from which they would have been authorized to find that the deceased came to his death by reason of any neglect or unskillful treatment on the part of the surgeons, and the court very properly declined to give the instruction therefor asked by the defendant.

The court did not err in refusing the instruction asked with reference to the consideration by the jury of the testimony given by the defendant. (*People v. Winters*, 125 Cal. 325.) Neither did the court err in refusing to instruct the jury, that if they should believe from the evidence, beyond a reasonable doubt, that the defendant was guilty of murder in the first degree, and yet should entertain a reasonable doubt, in the exercise of their discretion, as to whether the penalty to be imposed should be death, or only imprisonment for life, they should find the defendant guilty of murder in the first degree, with imprisonment for life only. The discretion which is given to the jury by section 190 of the Penal Code, in determining whether a person whom they find guilty of murder in the first degree shall suffer death, or imprisonment in the state prison for life, is a discretion to be exercised upon their own consideration of the evidence, and without any instruction from the court as to the grounds or reasons for the mode in which they shall exercise it. (*People v. Leary*, 105 Cal. 486.) It has been held not to be error to call the attention of the jury to this provision of the Penal Code, but it has never been held that it would be proper for the court to attempt to control their exercise of

this discretion, by presenting to them reasons for exercising it in one mode rather than in another.

The indictment sufficiently charged the defendant with the crime of murder. This sufficiency is not impaired by the manner in which the facts constituting the crime, or the circumstances under which it was committed, are subsequently stated therein.

The verdict of the jury was rendered May 5, 1901, and at that time May 15th was fixed as the day for pronouncing judgment. This time was afterwards continued until May 23d. On that day the defendant moved to set aside the verdict, upon the grounds, among others, of misconduct of the jury and of newly discovered evidence. After this motion was made, but before argument thereon, the defendant asked the court for a continuance, and that he be given reasonable time to procure the affidavits of witnesses as to such newly discovered evidence, and misconduct of the jury. The bill of exceptions recites, "that no affidavit by the defendant, or by any one on his behalf, of any kind, or at all, were presented to the court in support of said motion for a continuance, showing any fact whatever in regard to said alleged newly discovered evidence, or that said verdict was decided by lot, and by means other than a fair expression of opinion on the part of the trial jurors, and no showing of any kind whatever was made in support of said motion for a continuance." Under these circumstances the court very properly refused to grant the continuance. The defendant was not entitled to have time within which to procure such affidavits, unless he should at least give to the court reasonable grounds for his belief that the affidavits could be obtained, and that they would show matter entitled to be considered upon the motion to set aside the verdict.

The judgment is affirmed.

Garoutte, J., Van Dyke, J., McFarland, J., Temple, J., and Beatty, C. J., concurred.

Rehearing denied.

[S. F. No. 1572. In Bank.—October 1, 1901.]

RUDOLPH J. TAUSSIG et al., Respondents, v. BODE & HASLETT, Appellant.

BAILMENT—STORAGE OF SPIRITS IN WAREHOUSE—FAILURE TO REDELIVER—PRIMA FACIE CASE—BURDEN OF PROOF—EXCUSE OF FAILURE.

Where barrels of spirits were stored in a warehouse, proof of the deposit, and of failure of the bailee to redeliver in accordance with the terms of the contract, makes a *prima facie* case for the bailor, and the burden of proof is upon the bailee to excuse the failure to redeliver.

ID.—LEAKAGE—SHIFTING OF BURDEN.—Where the bailee shows a return of the barrels stored, and that the contents have been lost by leakage, the burden shifts upon the bailor to prove affirmatively that the leakage was caused by the fault of the bailee.

ID.—STIPULATIONS LIMITING LIABILITY OF WAREHOUSEMEN—PUBLIC POLICY.—There is no public policy to be infringed by stipulations limiting the liability of warehousemen for loss or deterioration caused by the inherent qualities of the articles stored, or by defects in the vessels containing them, not caused by fault of the warehousemen.

ID.—WAREHOUSE RECEIPT—PRINTED STIPULATION—LEAKAGE AT OWNER'S RISK—FAILURE OF WAREHOUSEMEN TO INSPECT.—Where the warehouse receipt contained a printed stipulation that leakage was to be at the owner's risk, the owner of the spirits stored is conclusively chargeable with knowledge thereof, and is bound thereby. In view of such stipulation, it was not actionable negligence for the warehousemen merely to fail to inspect for leakage the barrels of spirits, though they were stored two tiers high, with no passageway between the tiers.

ID.—DUTY OF BAILOR TO INSPECT—MODE OF PILING BARRELS.—Under the warehouse receipt, it was the duty of the bailor, and not of the bailee, to inspect the barrels for leakage. For the purpose of such inspection, he could have required a removal of the barrels, or a different mode of piling them. In the absence of any attempt of the bailor at inspection, the mode of the piling of the barrels by the bailee, which does not appear to have been otherwise than customary, is immaterial, even if it be assumed to be improper, as preventing convenient inspection.

ID.—NEGLIGENCE—ERRONEOUS INSTRUCTIONS.—Instructions to the effect that even if the leakage was due to the original negligence of the plaintiffs in storing the spirits in leaky casks, the defendant was nevertheless liable for the loss, if by ordinary care he could have discovered and cured the defect, and prevented the loss by leakage or shrinkage of the barrels, from defective cooperage, and allowing to the defendant no benefit whatever from the stipulation against loss from leakage, were erroneous, and require a reversal of the judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

George T. Wright, for Appellant.

Where the defendant has accounted for loss of the property stored, the burden of proving that the leakage was the result of defendant's negligence was upon the plaintiff. (*Wilson v. Southern Pacific Ry. Co.*, 62 Cal. 164; *Clafin v. Meyer*, 75 N. Y. 262;¹ *Schmidt v. Blood*, 9 Wend. 271;² 28 Am. & Eng. Ency. of Law, 648, 649, 650; *Cooper v. Barton*, 3 Camp. 5, note.) No recovery can be had for loss resulting from defective cooperage. (*Nelson v. Stevenson*, 5 Duer, 539; *Hudson v. Pazendale*, 2 Halst. & N. 575, 582.) The stipulation in the warehouse receipt was valid, and binding upon the plaintiff, and made the leakage at his risk, which is not shown to have been caused by the defendant's fault. (Story on Bailments, 9th ed., sec. 32; Schouler on Bailments and Carriers, 2d ed., sec. 20; 2 Am. & Eng. Ency. of Law, 51, note 5; *Mariner v. Smith*, 5 Heisk. 203; *Dimmick v. Milwaukee etc. Ry. Co.*, 18 Wis. 471; *Steele v. Townsend*, 37 Ala. 247;³ *Lake v. Hurd*, 38 Conn. 536; *Robinson v. Merchants' Dispatch Transportation Co.*, 45 Iowa, 470; *Adams Express Co. v. Sharpless*, 77 Pa. St. 516; *Strohn v. Detroit etc. R. R. Co.*, 21 Wis. 554.⁴) The instructions were erroneous. If plaintiffs were negligent in having their spirits stored in defective casks, defendants cannot be made liable, unless they willfully or by wanton negligence directly caused the loss. (Beach on Contributory Negligence, 33, 43, 45, 76, 77, 78, 82; *Gay v. Winter*, 34 Cal. 153; *Maumus v. Champion*, 40 Cal. 121; *Robinson v. Western Pacific R. R. Co.*, 48 Cal. 424; *Fleming v. Western Pacific R. R. Co.*, 49 Cal. 253; *Hearne v. Southern Pacific R. R. Co.*, 50 Cal. 482; *Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326; *Murphy v. Deane*, 101 Mass. 455;⁵ *Birge v. Gardiner*, 19 Conn. 511;⁶ *Robinson v. Cone*, 22 Vt. 222.⁷)

Reinstein & Eisner, and M. S. Eisner, for Respondents.

The plaintiff must prove the alleged loss by defective coop-

¹ 31 Am. Rep. 467.

² 24 Am. Dec. 143.

³ 79 Am. Dec. 49.

⁴ 94 Am. Dec. 564.

⁵ 3 Am. Rep. 390.

⁶ 50 Am. Dec. 261.

⁷ 54 Am. Dec. 67.

erage with reasonable certainty before plaintiff can be required to show negligence of the defendant. (*Clafin v. Meyer*, 75 N. Y. 260;¹ *Williams v. New York etc. Ry. Co.*, 56 N. Y. Super. Ct. 508; 4 N. Y. Supp. 834; *Arent v. Squire*, 1 Daly, 347; *Cox v. O'Riley*, 4 Ind. 368.²) A warehouseman who pays no attention to discover what is going on within his warehouse in relation to the goods intrusted to him is guilty of gross negligence. (*Chenowith v. Dickenson*, 8 B. Mon. 156.) A bailee must use care and watchfulness, necessary to preserve the article bailed. (*Hatchett v. Gibson*, 13 Ala. 587.) A stipulation limiting liability cannot excuse a bailee's negligence. (*Lancaster County National Bank v. Smith*, 62 Pa. St. 47; *Collins v. Burns*, 63 N. Y. 1; *Canfield v. Baltimore etc. Ry. Co.*, 93 N. Y. 532;³ *Blumenthal v. Brainerd*, 38 Vt. 402;⁴ *Holtzclaw v. Duff*, 27 Mo. 392.) The bailee must prove that he was not at fault, and used proper precautions. (*Jackson v. Sacramento V. R. R. Co.*, 23 Cal. 269; *Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 164; *Wilson v. California Cent. R. R. Co.*, 94 Cal. 171; *Clafin v. Meyer*, 75 N. Y. 260;⁵ *Coleman v. Livingston*, 36 N. Y. Super. Ct. 32; *Golden v. Romer*, 20 Hun, 438; *Schmidt v. Blood*, 9 Wend. 268; *Reed v. Crowe*, 13 Daly, 164; *Arent v. Squire*, 1 Daly, 347; *Burnell v. New York Cent. Ry. Co.*, 45 N. Y. 184;⁶ *Fairfax v. New York Cent. etc. R. R. Co.*, 67 N. Y. 11; *Schwerin v. McKie*, 51 N. Y. 180;⁷ *Woodruff v. Painter*, 150 Pa. St. 91;⁸ *Clark v. Spence*, 10 Watts, 335; *Cox v. O'Riley*, 4 Ind. 368;⁹ *Boies v. Hartford etc. R. R. Co.*, 37 Conn. 272;¹⁰ *Lynch v. Kluber*, 46 N. Y. Supp. 428; 20 Misc. Rep. 601.) A warehouseman is liable for leakage or loss resulting from want of ordinary care to preserve and protect the property. (*Baltimore etc. R. R. Co. v. Schumacher*, 29 Ind. 168;¹¹ *Chenowith v. Dickinson*, 8 B. Mon. 156.) If the negligence of the plaintiff was a remote cause, and the defendant might have avoided the loss by ordinary care, the defendant must make the loss good. (Beach on Contributory Negligence, sec. 25, p. 31; *Esrey v. Southern Pacific Co.*, 103 Cal. 545; *Fox v. Oakland etc. Ry. Co.*, 118 Cal. 55, 62.¹²)

¹ 31 Am. Rep. 467.² 58 Am. Dec. 633.³ 45 Am. Rep. 268.⁴ 91 Am. Dec. 349.⁵ 31 Am. Rep. 467.⁶ 6 Am. Rep. 61.⁷ 10 Am. Rep. 581.⁸ 30 Am. St. Rep. 786.⁹ 58 Am. Dec. 633.¹⁰ 9 Am. Rep. 347.¹¹ 96 Am. Dec. 510.¹² 62 Am. St. Rep. 216.

BEATTY, C. J.—The defendant is proprietor of a bonded warehouse in the city of San Francisco. On the 20th of January, 1896, it received from the plaintiffs, and stored in its warehouse, sixty-four barrels of spirits. About the 4th of March, following, it was discovered that some of the barrels were leaking, and immediately notified the plaintiffs, who, upon examination, found that eight barrels showed excessive outage. One barrel was practically empty, three or four leaking badly, and the others to some extent. The total amount of loss, over and above the ordinary allowance for evaporation, was $181\frac{1}{2}$ gallons, equal to $225\frac{1}{2}$ proof gallons, of the value of \$434.50. The plaintiffs sue to recover that amount, and charge, by the first count of their complaint, that the loss was due to leakage caused by the careless, negligent, and improper handling and storage of the barrels by the defendant. In a second count they simply allege a delivery of the 64 barrels to defendant on a contract of storage, and a failure and refusal of the defendant to redeliver on their demand $181\frac{1}{2}$ gallons of the amount stored. The cause was tried by a jury, upon evidence relating almost exclusively to the first count, and the instructions requested by the parties and given or refused by the court bore mainly upon the measure of defendant's responsibility for a loss caused by leakage from the barrels during the time they remained on storage.

The jury brought in a verdict for the plaintiffs, and the defendant appeals from the judgment and from an order denying a new trial.

Some question is made as to the sufficiency of the evidence to sustain the verdict, and with reference to this point there is a controversy as to the burden of proof, but as to this little need be said. We agree with respondents, that in a case of this character, proof of the deposit and of failure of the bailee to redeliver in accordance with the terms of the contract, makes a *prima facie* case, and that the burden is upon the warehouseman to excuse the failure to redeliver; but we also agree with the appellant, that when, as in this instance, he shows a return of the packages stored, and that the contents have been lost by leakage, the burden shifts to the plaintiff to prove affirmatively that the leakage was caused by the fault of the bailee. This was the principle decided in *Wilson v. Southern Pacific R. R. Co.*, 62 Cal. 164, and it is entirely reasonable and just. But even in this view there was evidence sufficient to sustain the verdict for plaintiffs, if the in-

structions of the court correctly stated the law. Not that the defendant was shown to have stored or handled the casks improperly, which is one of the things that the plaintiffs undertook to prove, but only because there was a failure on the part of defendant, according to the rule laid down by the court, to make sufficiently frequent and careful inspection of the casks for the purpose of determining whether they were leaking.

There was an effort to prove that the warehouse was improperly constructed or badly arranged, so that the casks were exposed to drafts, the effect of north winds, etc., causing shrinkage of the staves. But upon this point we think there was a failure of proof, while on the other hand there was very strong evidence that the casks that leaked were faultily constructed. And besides, the plaintiffs knew, or had the means of knowing, all about the arrangement and situation of the warehouse, whether and to what extent it was exposed to drafts or north winds, how casks were ordinarily piled and arranged on the floor, and in what position, with reference to the doors of the warehouse, these sixty-four casks were placed.

It was shown, however, that the casks were piled in a double tier,—chime to chime,—and two tiers high, with no passage-way between, so that one head of each cask was concealed from view as they lay, and so that they could leak at the covered ends without discovery.

Under the instructions of the court, the jury were at liberty to find that this was actionable negligence on the part of the defendant, and in view of the extreme weakness of the evidence as to any other fault or negligence of the defendant, we are justified in assuming that the verdict was based wholly upon a finding of negligence in this particular, and, at all events, the verdict cannot be sustained if the jury were erroneously instructed to the prejudice of the defendant in respect to this matter.

Whether it was actionable negligence on the part of the defendant to fail to inspect the casks for the purpose of detecting leakage, depends primarily upon the terms, express or implied, of the contract of storage, construed in the light of the circumstances of its execution. The only circumstances material to be considered in connection with the terms of the contract as contained in the warehouse receipt are that the plaintiffs had been storing spirits in the defendant's warehouse for several months before these sixty-four casks were stored in January, 1896; that the practice was to have the spirits shipped directly to the warehouse; that on the ar-

rival of a carload the plaintiffs were notified, and sent their agent to inspect the goods, and especially to see that the cooperage was all right,—to see, in other words, that the casks were in a condition to be safely stored. Both parties were equally well informed as to the volatile nature of spirits, and the danger of loss from leakage and evaporation. On the arrival of these sixty-four casks at the warehouse, the plaintiffs were notified, and, in accordance with their usual practice, sent their agent to inspect the cooperage. Both he and the agents of defendant satisfied themselves that the barrels were in good condition and fit to be stored, and thereupon the defendant issued its receipt, in the following terms:—

Parties are reminded that transfers of merchandise are not complete unless made on the books of the warehouse.

GENERAL INTERNAL REVENUE BONDED WAREHOUSE No. 1.

First District of California.

No. 121.

BODE & HASLETT, Proprietors.

N. E. cor. Third and King Streets.

SAN FRANCISCO, January 20, 1896.

RECEIVED on storage from Louis Taussig and C.

Distiller and Brand. Numbers. No. of Packages.

American Dist. Co. 134901 / 964 64 sixty-four bbls. spirits.

Non-negotiable.

BODE & HASLETT.

W. A. JAMES.

This receipt is given in accordance with the California warehouse laws, as well as the laws of the United States. Loss or damage by fire, the elements, shrinkage, leakage, or natural decay, at owner's risk.

Counsel for the respective parties differ as to the effect of the notice printed on the face of this receipt, that loss by leakage was at the owner's risk. Respondents claim,—1. That the notice is no part of the contract; and 2. That even if it is treated as a binding stipulation, it could not exempt the appellant from liability for loss by leakage, which, as they contend, might have been discovered and prevented if the casks had been inspected from time to time, or if they had been piled in a single tier, leaving both ends exposed to view. Both of these propositions are controverted by the appellant, and upon their determination the case seems to depend. We think it clear that the notice is a part of the contract. It was

printed plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is, that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do. Assuming, then, that they read the receipt, and, whether they did or not, that they are chargeable with knowledge of its contents, they had fair warning that any loss by leakage was at their risk, or in other words, that the appellant declined all responsibility for loss by leakage. Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them, as one of the terms of the contract. The cases cited by counsel in which it has been held that notices printed or stamped on bills of lading, but not signed by the consignors, do not exempt common carriers from their common-law liability are not in point. They rest upon the peculiar nature of the public duties of common carriers, and the public policy of preventing them from limiting their liability by mere notices not expressly assented to by the shippers. The principle of those decisions is very clearly stated by Mr. Justice Davis, delivering the opinion of the supreme court of the United States in *Michigan Central R. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall., at page 328. The case of warehousemen is entirely different. There is no public policy to be infringed by stipulations limiting their liability for loss or deterioration caused by the inherent qualities of the articles stored, or by defects in the vessels containing them. They are not bound to receive articles offered for storage, and may make such terms as they choose to impose as conditions of their contract. In this case we think that it was clearly one of the terms of appellant's contract that it should not be responsible for loss by leakage. This, of course, would not exempt it from liability for leakage due to its fault, but did exempt it from the duty of watching these casks to detect leakage caused by defects in the casks, or resulting from any cause other than improper handling or storage. If prudence required the casks to be watched or inspected from time to time to see whether they were leaking, that duty devolved upon the respondents, not upon the appellant. And there was nothing to prevent the respondents from making such inspection as

often as they desired. The warehouse was open to them, but, so far as appears, they never sent any person to look after these goods until they were notified by appellant of the leakage discovered by those in charge of its warehouse. This, it seems to us, is an answer to their complaint as to the manner in which the casks were piled, in a double instead of a single tier. There is no satisfactory evidence that such mode of piling was either unusual or improper, but if we assume that it was improper, for the reason that it prevented convenient inspection, in the absence of any attempt at inspection by respondent, upon whom the duty rested, the improper piling of the casks was of no consequence. If they had gone to the warehouse and found themselves unable to make the necessary examination, they could have required the casks to be piled in a single tier, or they could have removed them. But sufficient has been said concerning the case presented by the evidence.

The vital question to be decided is, whether the law was correctly given to the jury in the instructions of the court. Generally, the instructions given were correct, but with regard to the duty of inspection for the discovery of leakage, we think the rule stated by the court was incorrect. One of the instructions was as follows: "The owner of liquids shipped or stored in barrels of any description is charged with the duty of supplying proper packages, especially where the liquid is volatile, such as spirits, and hard to contain or confine in receptacles, and the warehouseman is not responsible for damages arising from any inherent defect in the barrels delivered to him for storage, nor is he responsible if the negligence of the owner occasioned or contributed to the loss. Therefore, if you shall find that the barrels from which the leakage of the spirits took place were of defective construction, and unsuited for storage of spirits, and that such defect occasioned or contributed to the loss of the spirits, then you will find for the defendant. If the plaintiff was negligent originally, or the cooperage originally defective, and the leakage resulting was discovered by the defendant, or could by ordinary care have been discovered, and could have been prevented or cured by defendant, upon such discovery, by the exercise of ordinary care, then the defendant was bound to use such ordinary care in the premises."

By the latter part of this instruction the jury were plainly told that even if the leakage was due to the original negligence of the plaintiffs in storing the spirits in leaky casks,

the defendant was nevertheless liable for the loss, if by the exercise of ordinary care the defendant could have discovered and cured the defect, or prevented the loss. In another instruction given at the request of plaintiffs the jury were told, "that if you find from the evidence that the loss of the spirits for which the plaintiffs claim damages in this action was due to leakage or shrinkage while said spirits were in defendant's custody as a warehouseman, and if you should further find that the defendant could have prevented said leakage or shrinkage by the exercise of ordinary care, and that the defendant failed to exercise such ordinary care in the premises, and that the plaintiffs were damaged thereby, your verdict should be for the plaintiffs for the amount of damage."

And ordinary care was, by another instruction, defined to be that degree of care which a man of ordinary caution and prudence would manifest in looking to his own interests. In short, by the instructions given and refused, the case was left to the jury to be decided upon the proposition that the defendant was responsible for the loss if it had not exercised the same care in watching and guarding against leakage as the owners of the property should themselves have exercised if the goods had been in their own store, and the defendant was allowed no advantage whatever from its stipulation against loss from leakage.

This, we think, was error. In view of the contract, it was the duty of respondents, and not the duty of the appellant, to guard against latent defects in the casks, and against the effects of shrinkage. They knew, as well as the defendant, the danger of loss from these causes, and the means of guarding against it. The defendant had declined that risk, and it rested upon them to take the necessary precautions, in view of the danger.

The judgment and order of the superior court are reversed.

Temple, J., and Harrison, J., concurred.

McFARLAND, J., concurring.—I concur in the judgment of reversal. I also concur in the opinion of the chief justice, except so far as it might be construed to intimate that the evidence showed any negligence whatever on the part of appellant. In my opinion, the respondents would not have been entitled to recover, under the contract, and upon the evidence, if the instructions had been entirely free from error.

[S. F. No. 2407. In Bank.—October, 1, 1901.]

GEORGE A. NEWHALL, Respondent, v. A. T. HATCH et al., Defendants. SHERMAN, CLAY & CO., Appellants.

FORMER JUDGMENT—RES ADJUDICATA—DEMURRER—STATUTE OF LIMITATIONS—ACTION UPON ADDITIONAL PROMISE.—A former judgment, rendered upon demurrer to a complaint, on the ground that the action appeared upon the face of the complaint to have been barred by the statute of limitations, is not a bar to a new action based upon an additional promise, preventing the bar of the statute. [McFarland, J., dissenting.]

ID.—JUDGMENT UPON DEMURRER, WHEN AND WHERE NOT A BAR.—A judgment rendered upon the sustaining of a demurrer to a complaint will be a bar to another action for recovery upon the same facts; but if other facts are stated, which supply the defects of the first complaint, or which present a different cause of action, the judgment upon the demurrer will not be a bar to the second action.

MORTGAGE BY DEED—STATUTE OF LIMITATIONS—RENEWAL OF NOTE SECURED—EFFECT AS TO THIRD PARTIES.—The renewal of a note secured by a deed intended as a mortgage, before the statute of limitations had run against the original note, had the effect to continue the original liability for the term named in the new note, and the effect of such renewal, with reference to third parties dealing with the land as that of the mortgagor, is the same as if the mortgagor had then executed a mortgage for the amount of the renewed note, and it could not be impaired by any subsequent acts of third parties.

ID.—LIEN OF JUDGMENT CREDITOR SUBORDINATE TO MORTGAGE—EXECUTION SALE—NOTICE TO PURCHASER—FACTS PUTTING UPON INQUIRY.—The lien of a creditor of the mortgagor, whose judgment was rendered against the mortgagor subsequent to the date of the renewal of the mortgagor's note, was subordinate to the lien of the mortgage; and where such creditor subsequently became purchaser at an execution sale under the judgment, after notice of the original terms of the mortgage by deed, he is chargeable with notice of all the facts which he might have obtained by inquiry relative to the renewal by the mortgagor of the original note prior to his judgment.

ID.—ESTOPPEL IN PAIS—NEW MATTER—PLEADING.—An estoppel *in pais*, arising from the conduct and representations of the plaintiff, is new matter, and the facts constituting it must be specially pleaded, in order to be relied on in bar of the action.

ID.—SILENCE IN FORMER ACTION NOT AN ESTOPPEL.—The mere silence of the plaintiff in the former action, in not stating the fact of the renewal of the note secured by the deed, and his merely allowing judgment to go against him, without an amendment of the com-

plaint setting up such fact, does not constitute an estoppel *in pais*, which could preclude the statement of the fact of such renewal in a new action. The plaintiff owed no duty to the judgment creditor of the mortgagor to inform him of that fact in the prior action.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

F. A. Berlin, for Appellant.

E. W. McGraw, for Plaintiff, Respondent.

Craig & Craig, for Frank Dalton, Assignee, etc., Respondent.

HARRISON, J.—The plaintiff loaned to the defendant Hatch the sum of fifty thousand dollars, November 10, 1891, for which Hatch, on that day, executed to him his promissory note, payable one day after its date. November 3, 1892, as security for the payment of four thousand dollars of said indebtedness, Hatch executed to the plaintiff a conveyance of certain lands in Alameda County, which was recorded in the office of the county recorder on the following day. This deed, though absolute in form, was intended as a mortgage, and on November 4, 1892, the plaintiff executed and delivered to Hatch a defeasance, which, after reciting the execution of the deed, and the property conveyed thereby, contained the following: "And whereas, said deed is absolute in form, yet in fact is intended as security for the payment of the sum of four thousand dollars loaned by said Newhall to said A. T. Hatch, now this defeasance witnesseth, That the said George A. Newhall, for himself, and for his heirs, executors, administrators, and assigns, hereby binds himself and agrees to reconvey the hereinabove mentioned and described property unto the said A. T. Hatch, his heirs, executors, administrators, and assigns, at any time, upon the payment to him of said sum of four thousand dollars and his demand for a deed to said property."

This defeasance was not recorded. September 20, 1895, Hatch renewed his note of November 10, 1891, by making a new promissory note of that date for the same amount, payable one day after its date. The four thousand dollars secured by the mortgage of November 3, 1892, was a portion

of the fifty thousand dollars agreed to be paid by this last promissory note, and no part of it, or of any interest thereon, has yet been paid.

April 21, 1896, a judgment was docketed in the office of the clerk of the superior court for Alameda County, in favor of Sherman, Clay & Co., a corporation,—the appellant herein,—and against the defendant Hatch, for the sum of \$47,792, and thereby became a lien upon all the real property of Hatch within that county. Under an execution issued upon this judgment, June 22, 1897, the sheriff levied upon and sold to said Sherman, Clay & Co. the lands described in the conveyance of November 3, 1892, from Hatch to the plaintiff, and on July 28, 1898, issued to the purchaser a deed therefor.

February 3, 1897, the plaintiff commenced an action in the superior court of Alameda County for the foreclosure of the aforesaid mortgage to him by Hatch, making Sherman, Clay & Co. one of the defendants, under the averment that it claimed some interest or lien upon the lands, but that said claim was subsequent to and subordinate to the mortgage of the plaintiff. In his complaint, the plaintiff set forth the execution of the deed and the terms of the defeasance of November, 1892, and alleged that no part of the said four thousand dollars had been paid. Sherman, Clay & Co. demurred to this complaint, upon the ground that the cause of action set forth therein was barred by the statute of limitations. This demurrer was sustained by the court, and the plaintiff declining to amend, judgment was entered, dismissing the action as against Sherman, Clay & Co. Upon the plaintiff's appeal from this judgment, it was affirmed by this court. (*Newhall v. Sherman, Clay & Co.*, 124 Cal. 509.)

June 27, 1899, upon the going down of the *remittitur* in the last-named action, the plaintiff commenced the present action, setting forth in his complaint the matter contained in his complaint in the former action, and the additional averment that on September 20, 1895, and prior to the accrual to Sherman, Clay & Co. of any claim or interest in the mortgaged premises, the defendant Hatch made and subscribed, in writing, a new promise to pay the said four thousand dollars secured by the mortgage of November 3, 1892. A demurrer to the complaint on behalf of Sherman, Clay & Co. was overruled, and thereupon said defendant filed its answer, denying the new promise by Hatch, and pleading the statute of limitations; also, setting forth its ownership of

the land by virtue of its aforesaid purchase at the execution sale, and in addition thereto, setting forth the proceedings in the former action by the plaintiff, and alleging that the same constituted a bar to the plaintiff's right to maintain the present action. Upon the trial the court made findings of fact substantially as above set forth, and rendered judgment in favor of the plaintiff. From this judgment and an order denying a new trial Sherman, Clay & Co. have appealed.

1. The judgment in the former action did not constitute a bar to the plaintiff's right of recovery herein. That judgment was rendered upon sustaining a demurrer to the complaint, and the question determined by the judgment was, that upon the facts set forth in that complaint the statute of limitations was a bar to the plaintiff's right to maintain the action. In that action the plaintiff sought to recover upon an obligation alleged to have been made in November, 1892, whereas in the present action his right of recovery is also based upon the additional promise of Hatch, made in September, 1895,—an issue which was not presented in the former action, and which could not have been determined therein. "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." (Code Civ. Proc., sec. 1911.) A judgment rendered upon sustaining a demurrer to the complaint upon the ground that the facts stated therein do not entitle the plaintiff to a recovery will be a bar to an action for a recovery upon the same facts, but if other facts are stated which supply the defects in the first statement, or which present a different cause of action, the judgment upon the demurrer will not be a bar to the second action. (*Terry v. Hammonds*, 47 Cal. 32; *Los Angeles v. Mellus*, 59 Cal. 444; *Morrell v. Morgan*, 65 Cal. 575.)

2. The four thousand dollars for which Hatch executed to the plaintiff his mortgage of November 3, 1892, was a part of the fifty thousand dollars loaned to him by the plaintiff, November 10, 1891, and for which he had then given his note. On September 20, 1895, the statute of limitations had not run upon this note, and its renewal by Hatch on that day had the effect to continue his original liability for the term named in the new obligation. Until the expiration of that term there was no point of time at which the statute would have

been available to Hatch to defeat his liability for the four thousand dollars secured by the mortgage, and the lien of the mortgage was therefore not extinguished when the present action was commenced. (*London etc. Bank v. Bandmann*, 120 Cal. 220;¹ *Southern Pacific Co. v. Prosser*, 122 Cal. 413.)

At the time the note was renewed, Hatch was the owner of the land, and the plaintiff was the owner of the debt. They were the only parties interested in the transaction, or that would be affected thereby, and the effect of this renewal of the obligation could not be impaired by any subsequent acts of others. The renewal had the same effect with reference to persons thereafter dealing with the land as if Hatch had then executed a mortgage for that amount. The appellant did not acquire its lien upon the lands until April 21, 1896, and as the lien of the plaintiff's mortgage was at that time in full force, the appellant's lien was subordinate thereto. When the plaintiff sought, in February, 1897, to foreclose his mortgage, the appellant herein was informed by the complaint in that action that his claim upon the land was that of a mortgagee, and notice was thereby imparted to it of all the terms of the mortgage which would have resulted from an inquiry on its part in reference thereto,—one of which was, that the indebtedness had been renewed by Hatch in 1895; and as the appellant is chargeable with all that such inquiry would have disclosed, it follows that it purchased the land at the execution sale with notice of the fact that the plaintiff's mortgage was a prior lien thereon.

3. If the appellant had intended to claim that the plaintiff was estopped from asserting the lien of his mortgage against the rights of the appellant by reason of any conduct or representation in reference thereto, this defense should have been specially pleaded. The proceedings in the former suit were set forth at length, and the judgment therein properly pleaded as a bar to the present right of recovery, but the defense of an estoppel *in pais* is distinct from that of an estoppel by record, and the facts constituting such defense are new matter, which must be specially pleaded. (*Davis v. Davis*, 26 Cal. 23;² *Etcheborne v. Auzeais*, 45 Cal. 121.) No defense of this nature is contained in the answer of the appellant, nor is there any finding by the court of facts supporting such defense, and an examination of the record fails to show that

¹ 65 Am. St. Rep. 179.

² 85 Am. Dec. 157.

any evidence was introduced at the trial from which such defense could have been established.

The representations or conduct of the plaintiff upon which the appellant relies as an estoppel *in pais* is his failure to set forth the promise of September 20, 1895, in the complaint in the former action, or to amend said complaint in that respect, and in allowing judgment therein to be entered against him. It is not shown that the appellant, or any one on its behalf, made any inquiry of the plaintiff respecting a renewal of the mortgage, or that the plaintiff made any direct statement to it respecting the same. Mere silence on the part of a party will not create an estoppel, unless he was under some obligation to speak, and a party invoking such estoppel must show that it was the duty of the other to speak, and that he has not only been induced to act by reason of such silence, but that the other had reasonable cause to believe that he would so act. There was nothing in the relations between the appellant and the plaintiff which made it the duty of the plaintiff to inform the appellant that Hatch had renewed his obligation. The plaintiff's lien upon the land was superior to that of the appellant, and he was under no duty towards the appellant requiring him to volunteer any information regarding this lien, or the time when it would expire. Docketing the judgment against Hatch did not give to the plaintiff any constructive notice of the appellant's interest in the land, and it was not shown that the plaintiff had any actual notice thereof. The appellant did not inform him of its intention to issue an execution upon its judgment, or to purchase the land at the sale thereunder, and it does not appear that the plaintiff had any knowledge or notice, at any time before the commencement of the present action, that the appellant contemplated issuing an execution upon its judgment, or purchasing the land at the sale thereunder.

There was no evidence at the trial that the plaintiff made any statement to the appellant with reference to the promise of September 20, 1895, and it is only by way of inference that it can be claimed that the appellant made the purchase in reliance upon the facts alleged in the former complaint. At the time this promise was made, the appellant had no interest in the mortgaged premises, and before it took any steps towards purchasing the land it was informed by the plaintiff,

in his complaint in the former action, that Hatch had executed the mortgage to him. By that complaint the appellant was informed that Hatch had subjected the land to a mortgage, and it knew that this mortgage had not been discharged of record. Under a similar state of facts, it was said of such a purchaser: "He further knew, as matter of law, that, under the statute of limitations, a renewal of the note was a possible event. He might, and as a prudent man he ought, before concluding his purchase, to have sought out Lent (the plaintiff) and inquired of him as to whether the note had been renewed in fact. If, on such application, Lent (the plaintiff) had told him that there had been no renewal, and if, thereupon, Chambers (the appellant), on the faith of the statement, had closed the trade and paid his money for the land, Lent (the plaintiff) would have been estopped from setting up the mortgage against the man whom his own false suggestions had misled. Not having pursued that course, however, Chambers (the appellant) must be understood to have bought and taken his conveyance subject to all hazards." (*Lent v. Morrill*, 25 Cal. 492.)

The appellant must also be deemed to have known, as matter of law, that the judgment dismissing the action was not a bar to another action upon a different statement of the facts, and that the plaintiff could quite as readily commence another action, setting forth the renewal, as to amend the complaint in that action by setting up the same fact. In assuming, however, that because the plaintiff took an appeal from the judgment instead of amending his complaint, the defects upon which the demurrer was sustained could not be obviated, the appellant relied upon its own judgment, and not upon any statement or representation of the plaintiff. The conduct of the plaintiff in this respect was purely within his legal rights, and any inference which the appellant might draw therefrom would not estop the plaintiff from asserting his rights. While the date of the mortgage set forth in the former complaint showed that the statute of limitations had run before that action was commenced, there was no statement therein that the debt had become barred, nor were the facts therein stated inconsistent with those set forth in the present complaint.

The judgment and order are affirmed.

Garoutte, J., Van Dyke, J., Beatty, C. J., and Temple, J., concurred.

McFARLAND, J., dissenting.—I am not able to agree with the conclusion reached by a majority of the court in this case. Waiving all other questions, I think that the judgment in the first action is a bar to the present action. “Whether a former judgment will operate as a bar to an action depends upon the identity of the two causes of action and of the parties.” (*Parnell v. Hahn*, 61 Cal. 131.) In the case at bar, the two actions were between the same parties, and upon the same identical cause of action,—namely, a promise to pay four thousand dollars, and a mortgage to secure it, made and executed in 1892. Respondent cannot claim that the cause of action is the new promise made in 1895; for, under that view, the mortgage would not cover it. (*Southern Pacific Co. v. Prosser*, 122 Cal. 413; *Wells v. Harter*, 56 Cal. 342.) Whether or not a renewal of a debt secured by a mortgage does, in any case, extend the life of the mortgage, is a question about which there is some conflict in the authorities. It was held, however, in *Southern Pacific Co. v. Prosser*, 122 Cal. 413, that when the promise is made after the statute of limitations has run, then it constitutes a new cause of action, which must be sued on, as such, and does not renew or extend the mortgage; but when the acknowledgment is made before the statute has run, and while the debt is still alive, as in the case at bar, then the original obligation is the cause of action, and carries with it the mortgage given to secure it. Therefore, in the case at bar, the two suits in question were upon the same cause of action,—the original obligation,—and judgment having gone against respondent in the first suit, that judgment is a bar to the second. The fact that in the first suit respondent did not present his case fully enough, as he might have done, gives him no legal right to try it over again in another suit, upon the same cause of action. This principle is fully stated in *Woolverton v. Baker*, 98 Cal. 628, as follows: “A party cannot litigate his cause of action by piecemeal, and after a judgment against him, seek in another action to obtain relief dependent upon the transaction therein adjudged, by bringing forward claims and demands *properly belonging to the first action*. The judgment against him is conclusive, not only of what was in fact determined, but also of all matters which might have been presented in support of his cause of action and litigated therein. The rule is stated by Vice-Chancellor Wigram in *Henderson v. Henderson*, 3 Hare, 115: ‘Where

a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' " (Citing cases. See also *Wells v. Edmison*, 4 Dak. 46, and cases cited; *Hamillon v. Quimby*, 46 Ill. 90; *Crew v. Pratt*, 119 Cal. 149.)

A judgment does not fail to be a bar, merely because it was rendered on demurrer. As was said in *Terry v. Hammonds*, 47 Cal. 32, whether or not such a judgment is a bar "depends upon the questions,—1. Whether the demurrer went to the merits of the action; and 2. Whether the cause of action is the same." (See Bigelow on Estoppel, 56.) "If parties join issue upon questions of law or fact, before a competent court, they must abide the decision." (*Trescott v. Lewis*, 12 La. Ann. 197.) "In petitory actions the defendant is bound to plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff may be pleaded as *res adjudicata* against any title which the defendant was possessed of at the time, but failed to plead." (*Shaffer v. Scuddy*, 14 La. Ann. 576). In *Hamilton v. Quimby*, 46 Ill. 90, it was held that "a former adjudication of the matter in controversy is conclusive between the parties, in a subsequent proceeding upon the same matter, not only as to the matters actually determined, but as to every other thing then within the knowledge of the complainant which might have been then set up as ground for relief and litigated in the first suit."

In the case at bar, the court finds that the judgment in the first case "was based solely on the ground that by the complaint in said action the claim of plaintiff in said action ap-

peared to be barred by section 337 of the Code of Civil Procedure." This was a final determination against respondent upon the cause of action set up in his complaint in that case, and which is the same cause of action set up in the case at bar; and upon what principle can he be allowed to litigate that adjudicated question in another action? There is not even the pretense that he failed to properly present his case in the former action through inadvertence, mistake, surprise, or excusable neglect. When he commenced the former suit, he knew the fact which he now says is necessary to a full statement of his cause of action, but did not aver it; his attention was specially called to the defect in his complaint, by demurrer; the court sustained the demurrer, and gave him leave to amend, and he refused to do so; and he now contends that after his appeal from the judgment, and after its affirmance, he could then commence and maintain a new suit on the same cause of action by simply putting into the complaint in the second suit what he refused to put into the complaint in the first. If this can be done, then there is no end of litigation, and no limit to multiplicity of actions. As before stated, there is here no new cause of action, and no new facts not existing within respondent's knowledge at the commencement of the first suit. In my opinion, the judgment and order appealed from should be reversed.

Rehearing denied.

[L. A. No. 891. Department Two.—October 7, 1901.]

JAMES COOK, Respondent, v. LOS ANGELES AND PASADENA ELECTRIC RAILWAY COMPANY, Appellant.

NEGLIGENCE—COLLISION OF ELECTRIC CAR WITH WAGON—QUESTIONS FOR JURY—NONSUIT—SUPPORT OF VERDICT.—In an action for injuries, caused by the negligence of the defendant in causing an electric car to collide with plaintiff's wagon at a regular crossing, where the evidence was conflicting, and that adduced on the part of the plaintiff tended to show that the car was running at an excessive rate of speed, and that the plaintiff was driving slowly and using due care, the questions whether, upon the whole evidence, the collision was inevitable, or defendant was guilty of negligence, and whether the plaintiff was chargeable with contributory negligence, were properly submitted to the jury. A motion of the defendant for a nonsuit in such case was properly denied; and a verdict for the plaintiff will not be disturbed upon appeal.

ID.—EVIDENCE—SPEED OF CAR—DISTANCE—SCHEDULE TIME—CROSS-EXAMINATION.—Where some of defendant's witnesses testified to the rate of speed of the car, questions asked them, on cross-examination, as to the distance between the termini, and the schedule time for that run, were within the range of proper cross-examination, and being preliminary, could not be prejudicial to the defendant.

ID.—REQUESTED INSTRUCTIONS SUBSTANTIALLY INCLUDED IN CHARGE.—The refusal of the court to give requested instructions, substantially included in the charge, which, as a whole, stated the law correctly, is not erroneous, and the fact that the precise language of the requests was not given, and that some of them were modified, cannot prejudice the rights of the appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

A. R. Metcalfe, and John D. Pope, for Appellant.

J. T. Houx, and Max Loewenthal, for Respondent.

HENSHAW, J.—This is an action to recover damages for personal injuries. The cause was tried before a jury and verdict was for plaintiff. From the judgment and from an order denying a new trial the defendant appeals.

At the place of the accident, defendant maintained a double track. Plaintiff attempted to drive across it with his vehicle. A car was approaching on each track. The car upon the track nearest to him somewhat obstructed his view of the farther car. Plaintiff was not driving fast, but at a jog-trot. An open manhole in the street necessitated his crossing the track. Plaintiff was at a regular crossing. He could not see the car approaching upon the farther track, though he looked, but, upon the other hand, the motorman of that car could have seen his horse as he drove upon the track. By the testimony of one witness, plaintiff was "driving slowly noticing things, like any other man driving ought to do and would do." As his horse stepped upon the farther track, the car upon the inner track slowed down, and the car upon the farther track, traveling at an excessive rate of speed, "shot past," struck plaintiff's vehicle, and inflicted the injuries complained of. All this, and more, to establish due care upon the part of the plaintiff, and negligence upon the part of the defendant in operating its car, and in moving it through the corporate limits of the city at a high and illegal rate of speed, was shown by the evidence. It is true, there was a conflict in the evidence upon these matters, but from the verdict the evidence favorable to plaintiff must have been accepted by the jury. The cause was one, then, properly submitted to the jury for determination, upon the question of defendant's contributory negligence, and upon the question of the accident having resulted from inevitable casualty. For this reason, also, the motion for a nonsuit based upon these grounds was properly denied.

The car by which plaintiff was injured traveled between Los Angeles and Pasadena. Some of defendant's witnesses, having testified to the rate of speed of the car, were asked as to the distance between Los Angeles and Pasadena, and the schedule time for that run. It is contended that this was error, being an endeavor to show that to make the schedule time the car would have to travel at an average rate of speed greater than that testified to by the witnesses. This is more an inference which appellant's attorney seeks to draw from the questions, than a matter established. It does not appear that such was the purpose of the inquiry. The questions were but preliminary. They were within the range of legitimate cross-examination, and the answers were entirely without injury to appellant, because in each case the witnesses testified that while they might travel at a higher rate of speed

than eight miles an hour without the limits of the city, within the limits of the city, and upon this particular occasion at the time of the accident, that was their rate of speed. Upon this point, therefore, it is enough to say that the questions themselves were fairly within the scope of legitimate cross-examination, and even if this were not so, the answers were productive of no injury to defendant, and therefore afford no ground for reversal. (*People v. Ebanks*, 117 Cal. 652.)

The refusal of the court to give certain instructions asked by defendant, and its modification of certain instructions proposed by defendant, are urged as injurious errors, but we think that as to no one of them is the complaint well founded. The matter of the instructions which were refused was clearly and fairly delivered to the jury in the instructions given, and the modifications were properly added to the proposed instructions, for otherwise, and in their original form, the court would have been justified in refusing to give them at all, as not containing a fair and exact exposition of the law. What was said in *Clark v. Bennett*, 123 Cal. 275, may be here repeated: "Considering these instructions [the instructions given], and that all the instructions given, as a whole, stated the law correctly, and fairly to both sides, we do not think that the refusal to use the precise language contained in the offered instruction refused could have prejudiced the rights of the appellant."

For the foregoing reasons the judgment and order appealed from are affirmed.

Beatty, C. J., and McFarland, J., concurred.

[Sac. No. 783. Department One.—October 10, 1901.]

CHARLES P. NATHAN, Appellant, v. GEORGE E. DIERSSEN, Respondent.

STATUTE OF FRAUDS—PAROL AGREEMENT TO TRANSFER LAND.—A parol agreement to transfer, without consideration, a strip of land which is part of a well-defined tract abutting upon a well-recognized boundary between adjoining tracts, as to which there is no dispute or uncertainty, is ineffective, as being in direct violation of the statute of frauds.

ID.—ERECTION OF DIVISION FENCE—UNAUTHORIZED ACT OF TENANT—FINDING AGAINST EVIDENCE.—The erection of a division fence between the two tracts, so as to include the strip as part of the defendant's land, by a tenant of the plaintiff who is a successor in interest of the tract from which the strip was granted by parol, cannot bind or estop the plaintiff, where it appears that the tenant had no authority to adjust the boundary. A finding that the plaintiff, with knowledge of the original agreement, erected a division fence upon the line originally agreed to by parol, is held to be against the evidence.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. E. E. Gaddis, Judge.

The facts are stated in the opinion of the court.

Isaac Joseph, and D. E. Alexander, for Appellant.

A. L. Shinn, and Albert M. Johnson, for Respondent.

VAN DYKE, J.—Action to quiet title.

A tract of land on the west side of the Sacramento River, in Yolo County, including the premises in controversy, up to the third day of February, 1889, belonged to one Herman Huber, at which time the said Huber died. It was proven on the trial that Augusta J. Huber was the widow of said Huber, deceased, and Herman L. Huber, their son, and that said Augusta and Herman L. were the devisees of said Herman Huber, deceased, under his last will and testament; that said will and testament had been admitted to probate in the superior court of Sacramento County; that said devisees and successors in interest of said Huber, deceased, prior to the distribution of the estate of said Herman Huber, deceased, mutually agreed to a partition of the real property of the de-

ceased, and executed to each other partition deeds of said property; that in said partition deeds there was assigned and granted to said Augusta J. Huber (afterwards Huggins), the northern part of said tract of land, containing 156.16 acres, describing the same by metes and bounds, and assigned and granted to said Herman L. Huber the southern portion of said tract, consisting of 155.16 acres, more or less, also described by metes and bounds; that said partition deeds were duly executed and acknowledged by the respective grantors thereof; that on July 29, 1892, a decree of distribution in said estate was made and entered, whereby the said body of land was distributed to and partitioned between said devisees, according to the partition theretofore made under the deeds executed by the respective parties as aforesaid,—that is to say, to Augusta J. Huggins (formerly Huber), the northern portion of said tract of land, and to Herman L. Huber, the southern portion of said tract; that the land described in plaintiff's complaint is embraced within the description of, and comprises the southern portion of, the land thus distributed to Augusta J. Huggins (formerly Huber), and joins the land distributed to Herman L. Huber. The plaintiff, by foreclosure proceedings and mesne conveyances, derives title from the said Augusta J. Huggins (formerly Huber). Upon the trial, the defendant offered in evidence a deed dated October, 1894, from Herman L. Huber and his wife to G. C. Simmons, conveying to said Simmons the property set apart and distributed to said Herman by the decree of distribution, and also offered in evidence a deed from said Simmons and wife, dated October 9, 1896, to defendant George E. Dierssen, conveying to him the same premises, and by the same description. To the introduction of these deeds the plaintiff objected, on the ground, among others, that the deeds did not describe the lands in controversy, which objection was overruled and the deeds admitted in evidence, and the plaintiff excepted. Against the objection of the plaintiff, the court allowed the following question to be asked of defendant's witness, Herman L. Huber: "Q. After the decree of distribution, did you and your mother make any agreement with reference to the line between the two tracts?" And he answered, "We did." Also, the following question, over the objection of the plaintiff: "Q. State what the agreement was, and what, if anything, was done with reference to making or fixing the division line." The witness answered in reference to the line

referred to in the partition and decree of distribution: "It come so they took the barn, but I was to have the house, leaving the line come a little south of the barn, so that it would give me plenty of room for my house and buildings. There was a survey made by a man by the name of Donaldson. He set the stake for the division line—he set the stake, as near as I can remember, so it gave me just that much more land in the front there for the house and building." Continuing, he says, in answer to the question, What was done in reference to the line?—"Mr. Scribner, who was Mr. Nathan's tenant, asked me if I knew where the line was, and I showed him the stakes and told him he could build the fence by the stakes. . . . Mr. Scribner did not know where the line was, and I told him as near as I could. I did not pay my mother, Mrs. Huggins, anything for the extra strip of land between the line established by partition deeds and decree of distribution and the line where this fence now stands."

Over plaintiff's objection, the court also permitted the following question to be asked of the witness Henry T. Huggins, who had married Mrs. Augusta J. Huber: "Q. State what agreement was made between Herman Louis Huber and his mother with reference to a division line between the two tracts awarded to them by the decree of distribution in the estate of Herman Huber, deceased, if you know." The witness answered, "The agreement was made that they should divide the land on the river front so as to throw the buildings on Herman Louis Huber's part of the place; a line was made by them on the river front, representing a division between their lands; this was done in the month of September, 1892."

In the brief of respondent's attorney it is admitted, "there was no dispute or uncertainty as to where the true line was. All parties knew where it was, but they deliberately disregarded the true line, and made one to suit themselves." The defendant does not rely upon adverse possession or the statute of limitations, but upon the establishment of a boundary line by parol. This, however, is not such a case, but an attempt to convey by parol, and without consideration, a strip of land belonging to one of the tracts abutting upon a well-recognized boundary line. This is squarely in the teeth of the statute of frauds. (Civ. Code, sec. 1091.) In support of his position in reference to establishing a boundary line by parol, respondent cites and relies upon *Cavanaugh v. Jackson*, 91 Cal. 580. In that case, however, as stated by the court,

"a dispute having arisen as to the boundary line between the two ranches, a surveyor was employed by plaintiff and defendant to make a survey and establish the true line. The line in that case was established in 1881, and the defendant occupied and used it exclusively up to the commencement of his action, which was in April, 1887, and the plaintiff never exercised any acts of ownership over it during that period." And the court say "This long-continued acquiescence in the line previously established, we think, is a ratification of the agreement made in 1881." *Sneed v. Osborn*, 25 Cal. 630, is also relied upon by respondent. The *syllabus* in that case says: "If the description in a deed is uncertain, the grantor and grantee may agree upon and establish the boundary line between the land granted and the remaining lands of the grantor, and such agreement will be binding upon the parties." *Moyle v. Connolly*, 50 Cal. 295, is another case relied upon by respondent. There, the agreement fixing the boundary line was in writing, and the court say, "We are of opinion that the written agreement made by Wells and Connolly on the second day of April, 1863, established the line between the parties here." *Tuffree v. Polhemus*, 108 Cal. 670, is also cited. In that case the court say, "The findings of fact established an executed parol partition,"—which is not this case, but an attempt to transfer by parol what is an admitted strip of land on one side of a recognized boundary line, to the owner of the land on the other side of said line. None of the cases relied upon by respondent support his contention.

It is certified in the bill of exceptions, "This is all the evidence." There is not a particle of evidence in the bill of exceptions to show that plaintiff ever authorized his tenant Scribner to adjust a disputed boundary line, much less to attempt a transfer of a strip of his land to Huber, the owner of the adjoining tract. Nor is there any evidence to show that he knew that the fence which had been erected by his tenant was not upon the true line, until some time thereafter. Scribner testifies: "In March, 1895, I occupied the land of C. B. Nathan, formerly belonging to the estate of Huber, deceased, as Mr. Nathan's tenant. I know the defendant Dierssen. The place Dierssen owns was, in 1895, owned by Herman Louis Huber. I became Mr. Nathan's tenant in February, 1895. I remember when the fence spoken of by other witnesses was erected. When I leased the place from Mr.

Nathan, or shortly thereafter, I wanted to use a portion of the ranch for pasture, and there was no division fence between the ranches. I sent word to Mr. Nathan that it would be necessary to have a fence there, and that I would like to know something about where I should put the fence. There was nothing—no place established—no line established, where to put the fence; he sent me word to find the line the best I could, and put the fence up. I went to Herman Louis Huber, and asked him if he knew where the line was. He told me he did"; and the witness states that he pointed out to him the line, which is the one that had been agreed upon between himself and his mother, already referred to. Defendant testifies: "The first objection made by plaintiff to me about the division line was about the middle of the summer of 1898; at that time he sent some men down to move the fence. They started in to take the present fence down, and I had them arrested. They began to dig holes to put the fence on the line according to survey taking in my house,—the house in which Herman Huber formerly lived. I stopped them by having them arrested, and threatened to have them arrested again if they attempted to put the fence on the line that is claimed to be the true line by Mr. Nathan." Yet the court finds that at the time the mortgage was executed (through the foreclosure proceedings of which plaintiff deraigns title), and at all times thereafter, plaintiff had full notice and knowledge of said agreement fixing said boundary line, and that he and said Herman L. Huber erected a division fence between said tracts, according to said line.

The judgment and order denying a new trial are reversed and the cause remanded.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[Sac. No. 744. Department One.—October 10, 1901.]

FARMERS AND MERCHANTS BANK OF STOCKTON,
Respondent, v. **FRED COPSEY and MARGARET**
COPSEY, Appellants.

PLEDGE OF NOTE AND MORTGAGE—COLLATERAL SECURITY—REMEDY—POWER OF SALE—FORECLOSURE.—A power of sale given upon a pledge and assignment of a note and mortgage as collateral security by a vendee of the mortgagor, who had assumed such note and mortgage, and given his own note and mortgage to the mortgagee as principal debtor, does not make a sale under the power an exclusive remedy of the pledgee, and he may bring an action in equity to foreclose the collateral security.

ID.—EXECUTION BY WIFE OF VENDEE—MARK—SUPPORT OF FINDING.—A finding that the wife of the vendee of the mortgagor executed the principal note to the plaintiff, and the assignment of the note, and the vendee of the mortgagor, by making her mark, with the proper attestation by a witness, is sufficiently proved by the testimony of such witness, and of the husband that he and his wife "went in and signed the note." The execution of the note by her is also admitted by her denial to a verified complaint, that she, "for any consideration whatsoever, made, executed, and delivered to the plaintiff that certain promissory note," which denial takes issue only upon the consideration, and not upon the making, execution, and delivery, of the note.

ID.—EXPRESS AGREEMENT TO PAY DEFICIENCY—OMISSIONS IN FORECLOSURE SUIT—LIABILITY OF VENDEE AND WIFE.—Where the vendee and his wife, who were principal debtors, in their assignment, as security for their debt, of the collateral note and mortgage, expressly agreed "to pay on demand whatever balance may be due after sale of the securities and application of the proceeds," the omission of the pledgor to make the wife of the vendee a party defendant in the foreclosure suit, and his omission to take a deficiency judgment therein against the original mortgagor, and the taking of such judgment only against the vendee, who had assumed payment of the mortgage debt, cannot release or affect the liability both of the vendee and his wife upon their express agreement to pay the amount of the deficiency.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial.
G. W. Nicol, Judge presiding.

The facts are stated in the opinion of the court.

J. B. Hall, and J. F. Ramage, for Appellants.

Budd & Thompson, for Respondent.

THE COURT.—Defendants appeal from the judgment and order denying their motion for a new trial.

The facts are substantially as follows: In October, 1892, one William H. Beckman conveyed certain real estate to defendant Fred Copsey. At the time of the conveyance, the premises were encumbered by a mortgage given by said William H. Beckman to one Henry Beckman to secure a promissory note for the sum of \$4,357, and, by the terms of the conveyance, the said Fred Copsey assumed and agreed to pay the said note and mortgage so made by said William H. to Henry Beckman.

Prior to June 17, 1895, the said Henry Beckman had become indebted to plaintiff, and had assigned the said note and mortgage to plaintiff as collateral for such indebtedness. On the last-named date there remained due and unpaid upon the said note and mortgage the sum of \$3,250, and defendants (who are husband and wife), in order to pay the same, agreed to and did execute their note and mortgage upon the same premises, to plaintiff, for the said sum of \$3,250, and also assigned and deposited the Beckman note and mortgage as collateral to plaintiff for their said note. The Beckman note so secured by mortgage had been indorsed and assigned by Henry Beckman. In the written assignment made by defendants to plaintiff of the Beckman note and mortgage, the plaintiff was authorized at any time, with or without notice, at public or private sale, to sell and dispose of the Beckman note and mortgage so held by it as collateral. It was provided in the assignment that in case of a sale of the Beckman note and mortgage by plaintiff, the balance, after paying costs and expenses, and the amount due by defendants on their note, should be paid to defendants. Defendants also agreed, in the assignment, that they would pay to plaintiff "whatever balance may be due after sale of securities and application of proceeds."

Plaintiff commenced foreclosure proceedings on the Beckman mortgage in August, 1896, against William H. Beckman, defendant Fred Copsey, and others, and procured a decree of foreclosure in due course.

After sale of the premises under the decree and order of sale, and the application of the proceeds, there remained a deficiency, for which judgment was docketed against de-

defendant Fred Copsey. Defendant Margaret was not made a party to said foreclosure suit. The deficiency judgment remaining unpaid, this action was commenced thereon, and resulted in judgment against defendants for the amount of said deficiency remaining due to plaintiff,—to wit, \$1,100.85 and costs.

Appellants' main contention is, that the plaintiff had no right to foreclose the Beckman note and mortgage by judicial sale, for the reason that the assignment authorized plaintiff to sell the note and mortgage. It is said the note and mortgage were held by the plaintiff as pledgee, and that the defendants, as pledgors, had authorized a sale, and therefore this method only should have been pursued. We think the authority was given for the benefit of the pledgee,—the plaintiff,—and was not exclusive. Where a special power is given to sell negotiable paper, taken as collateral security, upon default in the payment of the debt, the power is not exclusive. It is considered, in law, as given, not for the purpose of restricting or curtailing the rights of the pledgee, but for the purpose of enlarging his rights, making the pledge more advantageous to him by giving him a more effectual and speedy means of obtaining money from his security. He may in such case bring an action in equity to foreclose the security. (Jones on Pledges and Collateral Securities, secs. 645, 651; *McArthur v. Magee*, 114 Cal. 129. And such proceeding is expressly authorized by the Civil Code (sec. 3011), which provides: "Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale." The Civil Code further provides (sec. 3006): "A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations; but he may collect the same when due." In this case the plaintiff did the very thing authorized by the above section, by proceeding to collect the obligation.

It is claimed that the evidence is insufficient to sustain that part of finding 2 to the effect that defendant Margaret made and executed the note of \$3,250 to plaintiff, and the assignment of the Beckman note and mortgage as collateral therefor. The reason given for this contention is, that the Civil Code provides (sec. 14) that a mark is a signature

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"when the person cannot write, his name being written near it, and written by a person who writes his own name as a witness." The note and assignment appear to be signed,—

her
"MARGARET X COPSEY.
mark

"Witness to mark of Margaret Copsey: R. E. WILHOIT." The witness Fraser testified that he recognized the signature of Margaret Copsey by her mark. The witness Wilhoit testified that he signed his name as a witness. Defendant Fred Copsey testified, "So we went in and signed the note." This testimony amply supports the finding. Aside from this, the pleadings were verified, and defendant Margaret did not deny the making and signing the note. The denial is, that she, "for any consideration whatsoever, made, executed, and delivered to the plaintiff that certain promissory note." While a denial of the consideration, this is not a denial of the making and delivery of the note.

Finally, it is contended that the plaintiff released the defendants by not taking the deficiency judgment against William H. Beckman in the foreclosure proceedings. A conclusive answer to this is that the debt of William H. Beckman had been assumed by defendants. They gave their own note and mortgage for the purpose of paying it. They also assigned the Beckman note and mortgage as collateral, and in the assignment expressly agreed "to pay, on demand, . . . whatever balance may be due after sale of securities and application of proceeds."

The fact that plaintiff took the Beckman note and mortgage as collateral for a note and mortgage of defendants upon the same property indicates that plaintiff had in mind the personal liability of William H. Beckman upon the note. But if plaintiff chose to waive this security, it could not have injured defendants. In fact, there is no reason why plaintiff could not have entirely disregarded the Beckman note and mortgage, and brought suit against defendants upon the note and mortgage executed by them. They became the principals, and the Beckman note and mortgage merely collateral. Neither does the fact that plaintiff took a deficiency judgment against defendant Fred Copsey, alone, prevent it from maintaining this action upon the express agreement.

The judgment and order are affirmed.

Hearing in Bank denied.

[S. F. No. 2833. In Bank.—October 10, 1901.]

CHARLOTTE A. LEWIS, Administratrix, etc., Petitioner,
v. FRANK H. DUNNE, Judge of the Superior Court,
etc., Respondent.

REVISION OF CODE—CONSTITUTIONAL LAW—IMPROPER ENACTMENT—INSUFFICIENT TITLE.—The act of March 8, 1901 (Stats. 1901, p. 117), entitled "An act to revise the Code of Civil Procedure of the state of California, by amending certain sections, repealing others, and adding certain new sections," is unconstitutional and void, both because the law revised was not re-enacted and published at length as revised, and because it does not embrace but one subject, expressed in its title, as required by section 24 of article IV of the state constitution. The mere reference to the Code of Civil Procedure does not express any subject.

PETITION for writ of *mandamus* to a Judge of the Superior Court of the City and County of San Francisco. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

W. B. Bosley, John S. Drum, J. R. Pringle, Stafford & Stafford, and D. C. Deasy, for Petitioner.

John S. Partridge, for Respondent.

A. C. Freeman, George J. Denis, and W. C. Van Fleet, *amici curiae*, also for Respondent.

McFARLAND, J.—This is an original petition here for a writ of *mandamus*. An alternative writ was issued, and upon answer of respondent and argument of counsel the cause was submitted. Whether or not the writ should be made absolute depends upon the constitutionality of a certain act of the legislature approved March 8, 1901. If the act is constitutional, then the writ should be denied; if not, then it should issue. Several other cases involving the same questions have been submitted, and the decision in this case will be determinative of the others.

Petitioner contends that the act in question is void because violative of the following parts of section 24 of article IV of the state constitution: "Every act shall embrace but one subject, which subject shall be expressed in its title. . . . No

law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended."

The title of the act in question (Stats. 1901, p. 117) is as follows: "An act to revise the Code of Civil Procedure of the state of California, by amending certain sections, repealing others, and adding certain new sections."

The said Code of Civil Procedure was not "re-enacted and published at length as revised."

The first impression made upon the ordinary mind by a comparison of these constitutional provisions with the title and body of the act is, that in the latter there is a clear failure to comply with the former. It seems as though the mind of either layman or lawyer might accept with safety the construction which, at first blush at least, is so obvious, and we do not think that the reasoning of counsel for respondent, or authorities cited, overcome this obvious view, or rightly lead to an opposite conclusion.

1. Petitioner contends that both the title and the body of the act show that it was intended to be, and is, a revision of the code, and that therefore it is invalid, because the law revised was not "re-enacted and published at length as revised"; and we see no sufficient answer to this contention. It is said that the title does not express a revision, because the language used is, "to revise, *by* amending certain sections, repealing others, and adding certain new sections." But how could there be a revision of a sectionized code in any way other than by amending and repealing sections and adding new ones? With respect to this phase of the case, the words, "by amending," etc., are mere surplusage; the title would be substantially the same if the words "to revise" stood alone. And when we look at the body of the act we see clearly that it is a revision. It covers one hundred and fifty pages of the published statutes of 1901; it amends over four hundred sections; it repeals nearly one hundred sections; it changes the numbers of other sections; it adds a great many new sections; and it contains this clause, "Certain title and chapter headings of the said Code of Civil Procedure are hereby inserted, changed, and amended, as hereinafter provided," and then follow several pages of insertions, changes, and amendments of such headings. If this is not a revision, then it would be difficult to state what would constitute a revision. Moreover, prior legislation on the subject shows that the act

in question was the natural result of a purpose to revise. The preamble to the act states that by a certain act a commission had been appointed "for the revision and reforming of the law," and, among other things, "of the Code of Civil Procedure"; and it recites "That whereas said commission did theretofore, in pursuance of said act, file with the secretary of state a report recommending, among other things, *a revision* of the Code of Civil Procedure; now, therefore, in view of said recommendation, for the *purpose of revising* said code, the people of the state . . . do enact as follows." In view of all these considerations, we are forced to the conclusion that the act is a revision, and void for want of reenactment and publication at large of the revised law, as contended by petitioner.

2. But if the invalidity of the act for the reason above given could by any recondite, indirect, and abstruse reasoning be explained away, it is just as clear that the act is void for want of compliance with the other constitutional provisions, that "every act shall have but one subject, which subject shall be expressed in its title." It is apparent that the language of the title of the act in question, in and of itself, expresses no subject whatever. No one could tell from the title alone what subject of legislation was dealt with in the body of the act; such subject, so far as the title of the act informs us, might have been entirely different from anything to be found in the act itself. This, of course, would be admitted, except for the claim that although the title does not, as an independent instrument, express any subject, yet it does so by "reference."

It may be conceded that where the title of an act clearly expresses a definite subject, then the title of an act amendatory thereof may be helped out by reference to the title of the original act,—the title of the original act, which does express a subject, being incorporated into and published as part of the title of the amendatory act. But, in the case at bar, how does the reference in the title help its failure to otherwise express the subject? The reference is, really, not to the title of any former act; it is merely to "the Code of Civil Procedure of the state of California." Now, what is the Code of Civil Procedure? It is merely a name given to a large part of the general laws of the state. The part of the great body of our laws which is to be found under that name is not confined to any particular subject or subjects, but includes substantive law, criminal law, and legislation, that

might be properly classed under any category whatever,—as well as “civil procedure.” Nearly all of our general laws are arranged, for convenience, under four main headings, or names,—to wit, the Civil Code, the Code of Civil Procedure, the Penal Code, and the Political Code,—but no one of these codes is complete in itself; legislation under either code is inseparably interwoven with legislation under the others; and legislation upon any imaginable subject would not be held invalid because found in any particular code. In *Enos v. Snyder*, 131 Cal. 68,¹ it was contended that a certain provision of law did not affect rights involved in a civil proceeding, because found in the Penal Code, but this court said: “The position is not tenable. We have here a code system which is, for convenience and partial classification, divided into four codes, to each of which a name is given; but they are inseparably interwoven, and no one of them is complete in itself, or absolutely confined to a particular subject. Therefore, clear enactments of substantive law establishing rights—like section 294—are not to be held inoperative because found in any particular code.” It was also said in that case—touching the provision in the Penal Code for the recovery of certain expenses in a civil action,—“It would hardly be contended that the provision about liability in a ‘civil action’ is inoperative because found in the Penal Code.” How, then, can it be rightly said that a mere reference in the title of an act to the Code of Civil Procedure—or to any other code—expresses any subject? If so, what subject? If the reference had been merely to “civil procedure”—if it had been “an act concerning civil procedure,”—it is doubtful if it would have been in accordance with the clear intent of the constitution as to *one subject*. There is no definition, in our laws, of “Procedure,” nor can any satisfactory definition of it be found in the general authorities. For instance, some authorities hold that the law of evidence is part of the law of procedure, and others that it is not; and assuming that the former authorities are correct, could it be safely said that “pleading”—which is certainly a part of procedure—and “evidence” are not two different subjects, within the meaning of the constitution? In all the books of the law, pleading and evidence are uniformly treated as two entirely distinct subjects. But, as before stated, the title merely refers to one of our codes, and, con-

¹ 82 Am. St. Rep. 330.

sidering the multifarious character of the codes, it expresses no subject whatever. It does not even refer to a single section which is to be amended or repealed; and as to the "new sections," it does not give the slightest intimation as to what they are to contain, or what subject they are to deal with. And, according to respondent's contention these new sections need not deal with anything formerly in the code; in addition to being new sections, they could include new subjects. When we look into the body of the act, we see that it deals with a vast variety of subjects, many of which are totally distinct from each other; and many of them have no relation to civil procedure, while others are partly procedure and partly substantive law—declarations as to personal and property rights. And as the body of the act embraces more than one subject, it is for that reason invalid; for there is no field here for the play of the principle that a provision, the subject of which is expressed in the title, may be good, although another, not so expressed, be bad, where the two are not inseparably connected; because it would be vain to inquire which of several subjects is expressed in a title which expresses no subject whatever.

We cannot agree with the contention of some of respondent's counsel—apparently to some extent countenanced by a few authorities—that the provision of the constitution in question can be entirely avoided by the simple device of putting into the title of an act words which denote a subject "broad" enough to cover everything. Under that view the title, "An act concerning the laws of the state," would be good, and the convention and people who framed and adopted the constitution would be convicted of the folly of elaborately constructing a grave constitutional limitation of legislative power upon a most important subject, which the legislature could at once circumvent by a mere verbal trick. The word "subject" is used in the constitution in its ordinary sense; and when it says that an act shall embrace but "one subject," it necessarily implies—what everybody knows—that there are numerous subjects of legislation, and declares that only one of these subjects shall be embraced in any one act. All subjects cannot be conjured into one subject by the mere magic of a word in a title. As to this point, the supreme court of New Jersey, in *Rader v. Township of Union*, 39 N. J. L. 515, well says: "It is true that it may be difficult to indicate by a formula how specialized

the title of a statute must be but it is not difficult to conclude that it must mean something in the way of being a notice of what is doing. Unless it does this, it can answer no useful end. It is not enough that it embraces the legislative purpose—it must express it; and where the title is too general, it will accomplish the former, but not the latter. Thus a law entitled ‘An act for a certain purpose’ would embrace any subject, but would express none; and consequently it would not stand the constitutional test.” There is a good deal of discussion, in the briefs, of the supposed reasons for the constitutional provision in question—the evils which it was intended to remedy, etc.—but whatever considerations led up to its adoption, it is clear that its direct and immediate purpose was, that the title should, on its face, give at least some sort of information as to what the proposed act was about. This the title in question does not do.

We do not deem it necessary to notice in detail the authorities cited by counsel. As to those from other jurisdictions cited by counsel for respondent, it is to be observed that they were decided under state constitutions in which there was no such provision as that contained in section 22 of article I of the present constitution of California adopted in 1879—namely, “The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.” The constitution of this state of 1849 had a provision as to the title and subject of acts similar to said section 24 of article IV, but from an early date it was construed to be merely directory (*Washington v. Page*, 4 Cal. 388); and the purpose of said section 22 of article I was evidently to prevent such construction in the future. The declaration that all the provisions of the constitution are mandatory and prohibitory “applies to all sections alike.” (*Ewing v. Oroville Mining Co.*, 56 Cal. 654, 655.) The distinction between a constitution which contains this provision and those which do not is noticed by Mr. Justice Ross, in delivering the opinion of the court in *Earle v. San Francisco Board of Education*, 55 Cal. 491. After referring to the contention that the question there involved had been decided in a certain way in other states, he says: “It is true that it has been so decided, but under constitutions not containing a declaration that its provisions are ‘mandatory and prohibitory, unless by express words they are declared to be otherwise,’ as does the present constitution of this state.” And in connection with the claim

that the section of the constitution involved in this case should be liberally construed—and it certainly should be construed with reasonable liberality—it is well to quote these other words of the opinion in the same case: "To maintain the constitution as it is, is out first duty, and whenever it is encroached upon, we are bound to maintain its supremacy." In many of the state constitutions the clause concerning the title and subject of statutes differs materially from section 24 of article IV of our constitution. And in most of the cases cited by respondent from other states the title sustained referred, at least, to one subject, although the subject was somewhat general. The most extreme cases were those where the title was to establish a particular kind of code relating to one general subject—as, for instance, "An act to establish a probate code." Whether or not an act "to establish a code of civil procedure"—and confined in its body to civil procedure alone—could be validly passed under our present constitution, is a question not here before us. The question in the case at bar is, whether or not the title of an act passed under the present constitution, which merely refers to a part of the body of the general laws of the state, that is not confined to any subject, whatever, expresses the subject of the proposed act, within the meaning of the constitution.

But the authorities in other states, and under constitutions which do not contain the mandatory and prohibitory provisions, are not, by any means, uniform on this question. For instance, in *People v. Hills*, 35 N. Y. 449, the question was, whether the title, "An act to amend chapter 389 of the laws of 1851," was valid, under a constitutional provision that no private or local bill "shall embrace more than one subject, and that shall be expressed in the title," and it was held that it was not. The court said: "The provision of the constitution of this state in reference to this matter is very plain and simple, and easily understood." The "chapter" mentioned in the title contained 293 sections, and the body of the act showed that its purpose was to make an important amendment to section 290, and the court said: "The act under consideration does not indicate from its title what particular part of the section of the act of 1851 is amended, or any reference or indication of the subject-matter of the amendment." The court further said: "The next inquiry is, Is the substance of this act expressed in the title thereof? The statement of the question,

and a reference to the title, provide a conclusive answer. . . . From its title it might as well be supposed to refer to any one of the numerous topics embraced in the 293 sections of chapter 389 of the laws of 1851, as to the matter covered by the 290th section of that act. . . . To sanction such a procedure would be to override and nullify a plain, clear, and mandatory provision of the constitution." And then follows language quoted from a former opinion, as follows: "Nothing can be more dangerous to our free institutions, or to the rights of the people, than to encourage doubtful interpretation of the constitution, contrary to its more plain and natural import, as understood by the great body of the people. . . . It is very clear, to my mind, that the subject of this act is not expressed in its title, and it must therefore fall under the condemnation of this section of the constitution." (See also *People v. Supervisors*, 43 N. Y. 10; *People v. Denahy*, 20 Mich. 347; *Davis v. Fulton*, 21 Ga. 69; *Brooks v. People*, 14 Col. 413; *Rader v. Township of Union*, 39 N. J. L. 516; *Tingue v. Village of Port Chester*, 101 N. Y. 303; *Trumble v. Trumble*, 37 Neb. 341; *State v. Scholl*, 58 Kan. 507; *State v. Mitchell*, 17 Mont. 67; *Kedzie v. Ewington*, 54 Minn. 117.)

The decisions in California on this subject are not directly determinative of the question presented in the case at bar. The sufficiency of such a title as is here involved has never been presented to this court. *People v. Parvin*, 74 Cal. 549, is the only case here that can be at all insisted upon as supporting the respondent's contention. The title under consideration there was this: "An act to amend section 3481 of the Political Code." It referred to one single section, and named it. The almost universal custom of the legislature, in the numerous amendments which it has made to the codes, has been to put into the title of the amendatory act, after the number of the section, additional words expressing the subject of the act—as, for instance, "relating to the writ of prohibition," "relating to the lien of mechanics and others," etc. In a very few instances—not more than two or three having been called to our attention—the additional explanatory words have been omitted, and one of these was involved in *People v. Parrin*, 74 Cal. 549. A bare majority of the court—two justices dissenting and one not participating—held that the title was sufficient; but if we accept the decision as sound, it goes no further than to hold that the title of an act amending a single section

of a code is sufficient, if it directly refers to the section and designates it by its number. It is not an authority for the sufficiency of such a title as is here involved, which refers to no section whatever, and it cannot be considered as determinative of the question involved here, which was not before the court in the facts of that case. On the other hand, in the opinions rendered in the following cases, although the cases themselves are not directly in point, the reasoning by which certain titles were held to be bad, and others good, points to the insufficiency of the title involved in the case at bar: *People v. Parks*, 58 Cal. 624; *Ex parte Liddell*, 93 Cal. 638; *Hellman v. Shoulters*, 114 Cal. 136; *People v. Mullender*, 132 Cal. 217.

Complaint is made that the rule as above stated would put the legislature to great inconvenience when it desired to make a great many amendments or indulge in a great deal of legislation at one session or at one time. That consideration could not, under any circumstances, destroy a constitutional provision. But—without impugning the wisdom of any provision of the act before us—it is quite apparent that the very purpose of the constitutional provision in question is to prevent the evils which might come from hasty, inconsiderate, or wholesale legislation. Statutes which cannot be enacted in the manner prescribed by the constitution should not be attempted. A scarcity of statutory laws, and want of facility for passing them, are not among the evils of the times.

Our conclusion is, that, for the reasons above stated, the said act of March 8, 1901, is unconstitutional, and void for all purposes, and is inoperative to change or in any way affect the law of the state as it stood immediately before the approval of said act.

Let the alternative writ be made absolute.

Henshaw, J., Van Dyke, J., Temple, J., Harrison, J., and Garoutte, J., concurred.

BEATTY C. J., concurring.—I concur in the judgment, on the ground first discussed in the opinion of Justice McFarland. The act of 1901 is certainly a revision of the Code of Civil Procedure, and, as such, required to be re-enacted and republished at length, in order to satisfy the mandate of the constitution, but, in my opinion, it does not embrace more than one subject, and that subject is clearly expressed in its title.

The rules of procedure in civil cases constitute but a single and well-defined subject, and our present code, as adopted in 1872, with its subsequent amendments, embraces but few provisions not strictly germane to that subject. If it had been enacted since the adoption of our present constitution, it would have been entirely valid, except as to those few provisions. But it was valid in all particulars at the time of its enactment, and was not invalidated by the adoption of the new constitution, even as to such of its provisions as did not relate to the procedure in civil cases. The code itself therefore became and remains a subject, and a single subject, of legislation. An act to amend it or revise it deals with a single subject, and the title of such an act expresses the subject when it announces the purpose of the legislature to amend or revise the code. The authorities cited in the briefs of counsel fully sustain the proposition that an act entitled an act to amend any valid existing statute described by its title is sufficiently descriptive of the subject, and of the whole subject, embraced in such statute.

But conceding that an act to revise or amend our existing code would be invalid as to any particular provisions not germane to the subject of procedure in civil cases, the act would be in other respects free from objection; and no provisions of the act of 1901 have been called to our attention which deal with other subjects, and certainly the particular provision here in question does not.

For these reasons, thus briefly indicated, I dissent from the views of the court respecting the second objection to the act.

Rehearing denied.

[Crim. No. 710. Department One.—October 11, 1901.]

THE PEOPLE, Respondent, v. BERNARD WARD, Appellant.

CRIMINAL LAW—SUFFICIENCY OF INFORMATION—SUBSTANTIAL CONFORMITY TO STATUTE—USE OF EQUIVALENT WORDS.—An information for a felony is sufficient if it substantially conforms to the statute, and uses words equivalent in meaning thereto, though not the precise words employed in the statute.

ID.—INFORMATION FOR EMBEZZLEMENT—CHANGE OF FORM OF EXPRESSION IN STATUTE.—An information for embezzlement which shows that the defendant received funds by virtue of his trust as the financial secretary of a corporation, and embezzled and converted the same to his own use, "contrary to his said trust," is not defective because not using the statutory words, "not in the due and lawful execution of his trust." The two expressions are equivalent, and convey the same meaning.

ID.—PROOF OF INCORPORATION—DE FACTO EXISTENCE.—It is sufficient to prove the *de facto* existence of the corporation, the funds of which were embezzled by the defendant; and proof that it was a corporation *de jure* is not essential.

ID.—DEMAND FOR MONEY EMBEZZLED—AUTHORITY OF TREASURER.—A demand, by the corporation, for the money embezzled is not an indispensable requirement of the law, to constitute the offense, which may possibly be proved without a demand, though a demand and refusal, if other essential facts exist, is evidence of embezzlement. A demand by the treasurer of the corporation, who was also a member of a special committee to investigate the alleged embezzlement, was made by sufficient authority.

ID.—DISPROVED DENIAL OF RECEIPT OF EMBEZZLED MONEY—EVIDENCE OF OFFENSE.—Where the defendant not only refused to comply with the demand for return of the money, but denied that he ever received any part of the money, alleged to be embezzled, and such denial was disproved, and it was found by the jury that he did receive it, the fact of such receipt renders the denial thereof convincing evidence of the offense charged.

ID.—EVIDENCE OF OTHER MONEYS DRAWN BY DEFENDANT.—Evidence is admissible that other moneys of the corporation were drawn by the defendant, upon similar orders, from the same and other banks, and were delivered to the defendant, and that they were not drawn for the protection of the corporation, or because of its wishes.

ID.—PROOF OF CORPUS DELICTI—ORDER OF EVIDENCE.—Proof of the *corpus delicti* does not necessarily involve or require proof that the crime was committed by the defendant. The proper order of evidence is, that there should be, first, independent proof of the body

of the offense, but a case should not be reversed, merely because of a departure from such order. In this case it is held that the *corpus delicti* was sufficiently proved, before proof of the obtaining of other moneys by the defendant.

ID.—IMPEACHMENT OF WITNESS—CONVICTION OF FELONY—ABSENCE OF SENTENCE.—A witness may be impeached by showing that he has been convicted of a felony by the verdict of a jury, and the fact that no sentence had yet been pronounced upon the witness is immaterial, where the verdict does not appear to have been set aside.

ID.—EVIDENCE OF REPUTATION—PERSONAL KNOWLEDGE—STRIKING OUT TESTIMONY.—The testimony of witnesses called to prove the reputation of a witness, who testified from personal knowledge only, was properly stricken out.

ID.—REFUSAL OF INAPPLICABLE INSTRUCTIONS.—Requested instructions which are inapplicable to the evidence are properly refused.

ID.—AUTHORITY TO DRAW MONEY TO DELAY CREDITORS—DEFENSE TO EMBEZZLEMENT.—The fact that the corporation gave authority for the withdrawal of money from the bank, for the purpose of hindering and delaying its creditors, cannot constitute a defense to an indictment for the embezzlement of its funds.

ID.—REQUESTED INSTRUCTION AS TO TESTIMONY OF ACCOMPLICE.—Where the case was not tried on the theory that the treasurer of the corporation was an accomplice with the defendant in the embezzlement charged in the information, it requires something more than suspicious circumstances connected with other transactions to justify a requested instruction predicated upon his being an accomplice with the defendant; and where such requested instruction was also inaccurate and misleading, it was properly refused.

ID.—ARGUMENT OF COUNSEL—VITUPERATIVE EPITHETS—CHARGE TO JURY—PRESUMPTION.—Counsel for the prosecution ought not to indulge in extravagant vituperative epithets against the defendant, but where the court charges the jury in relation thereto, that they must not consider the personal views and opinions expressed by counsel, it is not to be presumed that the jury disregarded the charge, nor that the defendant was prejudiced.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. F. H. Dunne, Judge.

The facts are stated in the opinion.

Frank McGowan, and J. N. E. Wilson, for Appellant.

Tirey L. Ford, Attorney-General, A. A. Moore, Jr., Deputy Attorney-General, W. W. Foote, and J. J. Lerman, for Respondent.

HAYNES, C.—The defendant was convicted of the crime of embezzlement, and appeals from the judgment and from an order denying his motion for a new trial. The points made by appellant for reversal will be noticed in the order in which they are presented in his brief.

1. The information, I think, is sufficient. The facts alleged therein are, in substance, that, at the date and place named the defendant was the financial secretary of the Pacific Coast Marine Fireman's Union, a corporation; that by virtue of his trust as such officer there came into his possession, custody, and control the sum of four thousand dollars, the property of said corporation; and that he did, at a place and time named, "unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate the same to his own use, contrary to his said trust as such officer as aforesaid, contrary to the form," etc.

The crime charged is that of embezzlement as defined in section 504 of the Penal Code, and the only insufficiency alleged is, that the pleader omitted the phrase, "not in the due and lawful execution of his trust," and substituted therefor the words, "contrary to his trust as such officer as aforesaid." If the conversion to his own use was fraudulent and felonious, and "contrary to his trust," it could not be "in the due and lawful execution of his trust"; and if it was "not in the due and lawful execution of his trust," it was "contrary to his trust." The expressions are equivalent. It is conceded by appellant that if the information substantially conforms to the statute, it is sufficient. "Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words, conveying the same meaning, may be used." (Pen. Code, sec. 958.)

2. It is contended that there is no legal evidence of the incorporation of the Pacific Coast Marine Fireman's Union, whose money, it is charged, defendant embezzled. There was ample evidence that the Union was a *de facto* corporation existing under the name stated in the information, and proof that it was a *de jure* corporation was not essential.

3. Prior to the arrest of defendant, a demand was made upon him by Andrew Pryall, the treasurer of the Union, for the four thousand dollars charged in the information to have been embezzled. The demand was in writing, and was offered in evidence, and defendant objected that it was

"irrelevant, immaterial, and incompetent," and the objection was overruled.

It is now contended that a demand for the money is indispensable; that "without such demand, no offense exists," and that it did not appear that Pryall had any power or authority to make the demand. This ground of objection was not specified. But waiving that point, it was shown that Pryall was the treasurer of the corporation at the time the demand was made, and besides, was a member of a committee appointed by the corporation to investigate the alleged embezzlement, with "full power to act, according to their judgment, for the best interests of the Union." His office as treasurer, and the special authority given as a member of the committee, gave him ample power to make the demand, if a demand were necessary. A demand is not "an indispensable requirement of law in all cases," as contended by appellant, nor can it be true that "without such demand, no offense exists." A demand, followed by a refusal, if the other essential facts exist, is evidence of embezzlement, and sometimes indispensable evidence of it, but it is the fraudulent and felonious conversion of the money or other property that constitutes the offense, and that may often be proved without a demand. (*People v. Bidleman*, 104 Cal. 608; *People v. Royce*, 106 Cal. 173; Wharton's Criminal Law, sec. 1030.) *State v. Pierce*, 7 Kan. App. 418, cited by appellant, was a Kansas case, and was under a statute which made the refusal to deliver on demand the gist of the offense. It may be added to what has been said, that when the demand was made by Pryall the defendant responded that he had no money belonging to the Union; and he also testified that he never had the money charged to have been embezzled by him, nor any part of it. The jury found that he did receive it. If he did, his denial was convincing evidence of the offense charged.

4. It is contended that the court erred in permitting evidence to be given, tending to show that other moneys of the Union, besides the four thousand dollars specified in the information, came to the hands of the defendant.

The defendant, during the time covered by these transactions, was the financial secretary of the Union, and John Dougherty was treasurer.

The moneys of the Union had been deposited with various banks in the city of San Francisco. Under the by-laws of the

Union, such moneys could be drawn therefrom only upon drafts drawn by the financial secretary, countersigned by the treasurer and the board of trustees, or a majority of them; but—as appeared from the testimony of the defendant and other witnesses—a resolution was passed in January, 1897, empowering one trustee and the financial secretary and the treasurer, or a majority of the three, to draw the moneys so on deposit. The purpose of the resolution, it was said, was to place the money beyond the reach of anticipated creditors. The four thousand dollars here charged to have been embezzled was on deposit with the German Savings and Loan Society, and was drawn from that bank, March 1, 1897, under said resolution, on an order signed by Bernard Ward, secretary, and John Dougherty, treasurer, and made payable to “John Dougherty or bearer.” The body of the order was in Ward’s handwriting, and the money was delivered by the bank to Dougherty, who testified that he delivered it to Ward, who, however, denied that he received it, or any part of it.

It also appears, from evidence admitted over the objections of appellant, and which is the subject of the exception now being considered, that other moneys were drawn, on similar orders, from the same and other banks, aggregating \$9,635.93,—namely: from the San Francisco Savings Union, March 1, 1897, \$3,000; from the Hibernia Savings and Loan Society, March 5, 1897, \$3,000; from the German Savings and Loan Society, July 9, 1897, \$2,772 and \$721.70; and July 29, from the Hibernia Savings and Loan Society, \$142.23. All of these moneys, according to Dougherty’s testimony, were delivered to Ward; but the latter denies that he received them, or any part of them.

The objections to these several items of proof were, that the evidence was not relevant, and that the *corpus delicti* had not been proven. That these several withdrawals from other banks were intimately connected with the withdrawal of the four thousand dollars from the German Savings Bank, for the embezzlement of which appellant was being tried, is clear. The orders upon which they were drawn were in the same form, signed by the same persons, under the same authority, and the same reason existed for each of the withdrawals, so far as the Union was concerned, and also so far as concerned the defendant. It is argued that the mere with-

drawal of these other sums did not prove an embezzlement of them, nor of the four thousand dollars charged in the information. But if it were necessary to prove the embezzlement of these other sums, it was an essential step towards making such proof. This evidence, however, had a direct bearing upon the question of the embezzlement charged in the information, and was therefore relevant. The purpose of the resolution authorizing the treasurer and the financial secretary to withdraw these deposits from the several banks was to place these moneys beyond the reach of creditors. The same reason for the withdrawal of the four thousand dollars from the German Savings Bank on March 1, 1897, existed for the withdrawal of all the deposits in each of the several banks, at the same time; yet the remainder of the deposit in the German Savings Bank, amounting to \$3,493.70, was not withdrawn until July 9, 1897, and a balance of \$142.23 was left in the Hibernia Bank until July 27th, so that nearly four thousand dollars was left on deposit for more than four months after the first withdrawal. These facts tend strongly to show that the purpose and intent of defendant in withdrawing the four thousand dollars from the German Savings Bank was not the protection of the Union against the claims of creditors, and was therefore relevant to the issue being tried, and completely rebuts appellant's contention that "there is absolutely nothing to show that any of the alleged acts of Ward or Dougherty was not strictly in accord with the direction and wishes of the Union," for it is convincing evidence that none of the withdrawals was made for its protection or because of its wishes.

Nor is the other objection—"that the *corpus delicti* had not been proven"—or any validity. Proof of the *corpus delicti* does not necessarily involve or require proof that the crime was committed by the defendant, or person charged with having committed it. The general rule is, that it must first be shown; but, except in those cases where it is sought to put in evidence the confession or admission of the defendant, the order of proof is in the discretion of the court, and even in those cases plenary proof of the *corpus delicti* is not always required. In *People v. Whiteman*, 114 Cal. 338, letters of the defendant containing certain admissions were admitted before there was proof of the *corpus delicti*, and it was held not to be reversible error. Mr. Justice Temple said: "That it is the fairer course that there should be in-

dependent proof, first, as to the body of the offense, cannot be doubted. But I do not think a case should be reversed, merely because of a departure from the natural and just order of evidence." In this case, however, before this objection was made, Dougherty testified to drawing said four thousand dollars from the German Savings Bank at defendant's direction; that he delivered it to Ward; that Ward told him different yarns about it, and avowed his intention to devote it to purposes not authorized by his trust. Proof that said four thousand dollars had gone into Ward's hands, and of the demand may by Pryall upon him for said money, and his response that he had no money belonging to the Union, had also been given, and this evidence had been received without said objection being made. The objections here considered were not well taken.

5. Patrick Rogers, a witness called by defendant, was asked, upon cross-examination, whether he had been convicted of a felony. It was then shown that he had been found guilty of a felony, by a verdict of the jury, but had not been sentenced. It was objected, that, not having been sentenced, he had not been convicted. The objection was overruled, and the witness answered, "yes"; and it is now urged that the court erred in its ruling, and that the judgment should be reversed therefor.

Section 2051 of the Code of Civil Procedure provides: "A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony."

It is contended that at the time the witness testified he had not been "convicted of a felony"; that to sustain the ruling of the court, it must be assumed, as a matter of law, that the verdict of guilty constituted a "conviction." That such verdict does constitute a conviction, within the ordinary as well as the technical meaning of the word, seems to be well settled. Blackstone (book 4, p. 362), after speaking of the verdict of acquittal, says: "But if the jury find him guilty, he is then to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways: either by his confessing the offense and pleading guilty, or being found so by the verdict of his country." So at page 363: "It is not uncommon, when a person is convicted of a misdemeanor,

....to permit the defendant to speak with the prosecutor before any judgment is pronounced." So at page 375, the same author said: "We are now to consider the next stage of criminal prosecution, after trial and conviction are passed,which is that of *judgment*."

In *United States v. Gilbert*, 2 Sum. 19, 40, Mr. Justice Story said: "And here, in order to avoid ambiguity, it may be proper to state that conviction does not mean the judgment passed upon the verdict; but if the jury find him (the party) guilty, he is then said to be convicted of the crime whereof he stands indicted." (See also Bouvier's Law Dictionary, and cases cited, especially *Commonwealth v. Lockwood*, 109 Mass. 325,¹ and *Nason v. Staples*, 48 Me. 126.)

The words "convict" and "conviction" are used in the Penal Code in the sense above stated. "A general verdict upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the indictment." (Pen. Code, sec. 1151.) "Whenever a crime is distinguished into degrees, the jury, if they *convict* the defendant, must," etc. (Pen. Code, sec. 1157.)

At common law, persons convicted of an infamous crime were *incompetent* to testify, and this incompetency was required to be shown by the record, which included the judgment. "It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify....If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved, if the evidence be objected to), or by his plea of 'guilty,' which has not been followed by a judgment, the proof does not go to the competency, however it may affect his credibility." (1 Greenleaf on Evidence, sec. 375.) Our statute does not in any manner affect the competency of the witness. It does not brand him as "infamous,"—a quality determined by the character of the punishment inflicted. It deems him still capable of telling the truth, but permits the fact of conviction to be shown as a side light upon his moral character, thus affecting his credibility. The question as to whether such conviction could be shown if the

¹ 12 Am. Rep. 699.

verdict had been set aside by granting a new trial, or otherwise, does not arise, and is not considered.

6. The testimony of Mr. Crigler and of Dr. Baumeister, called by defendant to prove reputation, was properly stricken out. The cross-examination showed that each testified from personal knowledge only, and not from reputation.

7. Appellant's seventh point is, that the court erred in refusing to give the thirteenth instruction requested by the defendant, which is as follows: "If the jury believe from the evidence herein that the witness John Dougherty was induced or influenced to become a witness and to testify in this case by any promise of immunity from prosecution or punishment, or by any hope held out to him that if he testified against the defendant he would not be prosecuted for any alleged embezzlement against him, then the jury should take such facts into consideration in determining the weight which ought to be given to such testimony thus obtained. Such testimony should only be received by the jury with caution and scrutinized with care."

The only testimony in the record upon the subject of this instruction is the following: "Q. Have you ever been promised any immunity from punishment if you testified in the case of *People v. Ward*?—A. Never, by any one. Q. Do you know of any arrangement being made by which your information shall be dismissed after this case has been tried?—A. Never did. Q. You don't know of any?—A. No, sir." The instruction was properly refused.

It is also contended by appellant that as the authority given by the Union for the withdrawal of the money from the bank was for the fraudulent purpose of hindering and delaying its creditors, a conversion of it by the defendant did not constitute embezzlement, and that the court erred in not instructing the jury to that effect, as requested. The instruction was properly refused. The Union, by authorizing the withdrawal of the deposit, did not part with its ownership of the money, nor pretend or attempt to do so. As between it and its agent, to whom the money was intrusted, there can be no question as to its ownership. In *Commonwealth v. Cooper*, 130 Mass. 285, it was held to be no defense to an indictment for the embezzlement of the money, that it was intrusted to the defendant for an illegal purpose. (See also *Commonwealth v. Smith*, 129 Mass. 111;

State v. Shadd, 80 Mo. 358; *State v. May*, 20 Iowa, 305; *State v. Tumey*, 81 Ind. 559; *People v. Martin*, 102 Cal. 558.)

Appellant also contends that the court erred in refusing to give his proposed instruction No. 19, to the effect that if the jury believe from the evidence that Dougherty was an accomplice of the defendant in embezzling the money mentioned in the information, that no conviction could be had on his testimony, unless corroborated as required by section 1111 of the Penal Code.

The money charged in the information to have been embezzled by the defendant was the sum of four thousand dollars, which was withdrawn from the German Savings Bank on March 1, 1897. This money, as we have seen, was drawn upon the order prepared by Ward, and signed by Ward and Dougherty. Their authority to withdraw said money is not questioned, and in withdrawing it no offense was committed. The only evidence to which appellant makes any specific reference for the purpose of showing that Dougherty was an accomplice is, that Dougherty carried it to Ward's house; that he was nervous and excited when he obtained the money at the Hibernia Bank; that he intended to deposit it in a bank at Oakland, and that he did deposit this money in his own name in a bank in San Francisco, where it remained six weeks. Counsel's reference to the folios of the transcript (468—499) shows that the money here spoken of was not the money charged in the information to have been embezzled; and it is only claimed by counsel that these facts, with many more in the record, disclose very suspicious circumstances on Dougherty's part. The case was not tried upon the theory that Dougherty was an accomplice in the embezzlement charged in the information. Neither the case on behalf of the prosecution, nor the theory of the defense, admits the supposition that Dougherty was an accomplice of Ward, or Ward an accomplice of Dougherty, in the embezzlement of the money charged in the information. It requires something more tangible than "suspicious circumstances" connected with other transactions to justify such an instruction as that under consideration. Instructions asked may be refused, if there is no evidence on which to predicate them. "Refusal to give instructions not applicable is not error." (*People v. Daniels*, 70 Cal. 521.)

But the instruction, as requested, is inaccurate and misleading, and for that reason, if no other, was properly refused.

The material part thereof is as follows: "If, after carefully considering all the evidence herein, you believe that the witness John Dougherty, who has been examined for the people, and the defendant *embezzled the money mentioned in the information*, or that said Dougherty aided or abetted the defendant in the commission of *an embezzlement*, then John Dougherty is an accomplice. . . . I further charge you that if you believe said witness John Dougherty to be *an accomplice* of the defendant, then the jury is instructed, as law, that the testimony of an accomplice ought to be viewed with distrust." (The italics are mine.)

It will be observed that the first clause of the instruction limits the supposed complicity to the embezzlement of the money mentioned in the information,—namely, four thousand dollars,—whereas the clause immediately following removed the said qualification by the use of the disjunctive "or," thus: "or that said Dougherty aided or abetted the defendant in the commission of *an embezzlement*," or literally, "any embezzlement." If the record had not disclosed that other sums belonging to the Union had been withdrawn from the same and other banks at different times by Ward and Dougherty under the authority given them by the Union, our criticism might seem strained; but, as already stated, counsel for appellant, for the purpose of showing that Dougherty was an accomplice of Ward, refers only to a different sum withdrawn from a different bank, at a different time, and which appears to have been deposited for a short time by Dougherty in his own name. If counsel rely upon this circumstance to justify the proposed instruction, we may reasonably infer that the jury would have been misled by it.

8. In the opening argument on behalf of the people, counsel expressed his belief concerning the defendant, to the effect that he believed him to be a thief, an embezzler, and a scoundrel, and that he had not an honest hair in his head, or an honest bone in his body; and counsel for defendant excepted thereto.

The counsel for the people then stated that he was speaking from the facts in the case, and that his statements were deductions therefrom. Counsel have no right to indulge in extravagant expressions of their belief, or in the use of degrading epithets. But the judgment should not be reversed because counsel lose their temper and indulge in epithets, unless it clearly appears that it prejudiced the defendant.

The remedy for such excesses should be administered in the trial court, at the moment of transgression. The principal offense in such cases is against the dignity of the court, and of that decorum which should always be observed by counsel in a court of justice. It never aids the prosecution, and usually creates sympathy for the defendant. The court, however, in charging the jury, called attention to this incident, and said: "I want to charge you at this time, that the personal views and opinions of counsel, if any were expressed, must have no place in your deliberations. Counsel have no right to offer them to you, and you must not be swayed or guided in any way by such statements." We cannot assume that the jury disregarded this instruction, any more than we could assume that it considered evidence that had been stricken out.

9. Appellant's last point is, that the evidence is not sufficient to sustain the verdict: 1. Because there was no legal demand; 2. Because there was no misappropriation or conversion of the money; and 3. That defendant acted in accordance with his duty as financial secretary of the Union. These points are merely stated, not argued anew. They have each been covered by the discussion of the several questions we have considered. We find no ground upon which the judgment or order should be reversed, and advise that they each be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Garoutte, J., Harrison, J., Van Dyke, J.

Hearing in Bank denied.

[Sac. No. 809. Department One.—October 11, 1901.]

D. B. McFAUL, Respondent, v. MADERA FLUME AND TRADING COMPANY, Appellant.

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINE—PLEADING—DISCHARGE OF SERVANT'S DUTY.—In an action by an employee to recover damages from his employer for injuries suffered by him in the course of his employment, by reason of a defective machine, the omission to allege in the complaint that "the plaintiff was injured while in the necessary and proper discharge of his duty," does not vitiate the cause of action, nor render the complaint objectionable in that regard, in the absence of a special demurrer.

ID.—INHERENT DEFECT IN MACHINERY—INSTRUCTIONS—CONSTRUCTION.—An instruction directing the minds of the jury to an inherent defect in the machinery, which the defendant might have discovered by reasonable diligence, and of which the plaintiff was ignorant, and could not discover in the ordinary course of his employment, and predicated recovery thereon, is not misleading, because not comprising every element of recovery, where all of the elements essential to a recovery by the plaintiff were fully set forth in other portions of the charge, which must be construed together with such instruction.

ID.—EXPERT EVIDENCE—RELATIVE STRENGTH OF WROUGHT AND CAST IRON.—A qualified expert may testify as to the relative strength of wrought and cast iron, as material for the part of the machine in question, the evidence being pertinent and material to the issue.

APPEAL from a judgment of the Superior Court of Madera County. W. M. Conley, Judge.

The facts are stated in the opinion of the court.

D. N. Burnett, Frank H. Short, and H. E. Wilcox, for Appellant.

M. K. Harris, for Respondent.

THE COURT.—The plaintiff, an employee of the defendant, recovered judgment against it for the sum of three thousand five hundred dollars, as damages for personal injuries suffered by him, in the course of his employment, by reason of a defective machine. This appeal is prosecuted from an order denying defendant's motion for a new trial.

It is first urged that the complaint does not state a cause of action, the specific objection being that it fails to allege

that "the plaintiff was injured while in the necessary and proper discharge of his duty." No specific demurrer was directed to this alleged defect in the pleading, and in the absence of a special demurrer it will be held that the complaint is sufficient in this regard.

The following instruction is assailed: "If you find from the evidence that the accident through which plaintiff was injured resulted from an inherent defect in the machinery, as alleged in the complaint, which might have been discovered by the exercise of reasonable diligence on the part of defendant, and that plaintiff did not know, and was not in a position to have found out, such defect, in the usual and ordinary course of his employment, then you should find for the plaintiff and assess the amount of his damages." This instruction is assailed as not comprising all the elements of fact which were necessary to justify a verdict in favor of plaintiff. But, as this court has often held, the instructions must all be read and considered together, and here, in other portions of the charge, we find the jury fully instructed as to other elements of facts necessary to be found by them in favor of plaintiff before a verdict could be given him. By the instruction quoted, the minds of the jurors were directed alone to a single element of fact,—to wit, the defect in the machinery. Other instructions were equally direct and explicit as to other facts involved in the case, and considering all the instructions together, the court is convinced that the jury were not misled by the instruction given.

Another error complained of is, that the court permitted the witness Palmer to testify as to the relative strength of wrought and cast iron as the material for the part of the machine in question. In this there was no error. The evidence was pertinent and material, and the witness was qualified as an expert to give his opinion with reference to it. (Code Civ. Proc., sec. 1870, subd. 9.) Upon a careful consideration of the record we are not prepared to say that the verdict of the jury was excessive, or that the evidence was insufficient to support the verdict.

For the foregoing reasons the order is affirmed.

Hearing in Bank denied.

[S. F. No. 2190. Department One.—October 11, 1901.]

NAPA STATE HOSPITAL, by C. B. SEELEY, Treasurer,
Appellant, v. RICHARD FLAHERTY, Respondent.

SUPPORT OF INSANE ADULT SON—COMMON LAW—STATUTORY ACTION AGAINST FATHER—REMEDY.—The right to maintain an action against a father for the support of his insane adult son did not exist at common law; and if it exists in this state, it is purely a creation of statute, and the remedy therefor must be only that expressly provided for in the statute.

ID.—REPEAL OF REMEDY—LOSS OF RIGHT.—If the remedy for a right created solely by statute is repealed while the right is still inchoate, and not reduced to possession or judgment, the right is thereby lost, provided the repealing statute does not contain a saving clause.

ID.—IMPROPER ACTION BY TREASURER OF STATE HOSPITAL.—The treasurer of the Napa State Hospital has no statutory power to maintain an action in the name of the hospital to compel payment by a father for the support of his insane adult son at the former insane asylum. If the right of action against the father, under section 8 of the Insanity Law of 1889 (Stats. 1889, p. 330), has not been repealed by the Insanity Law of 1897, it can only be enforced by the board of trustees or managers of the hospital, as the successors of the board of trustees of the insane asylum.

ID.—ACTION FOR DEMAND ACCRUING TO HOSPITAL—WANT OF JURISDICTION OF SUPERIOR COURT.—The right given to the treasurer of the state hospital to recover upon any cause of action accruing to the hospital cannot sustain an action by him in the superior court, where the treasurer has no authority to collect an amount sued for, which accrued to the state insane asylum, and the amount alleged which accrued to the hospital is less than three hundred dollars.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion.

Tirey L. Ford, Attorney-General, and George L. Hughes,
for Appellant.

Gunnison, Booth & Bartnett, for Respondent.

COOPER, C.—The court below made an order sustaining defendant's demurrer to the amended complaint, and this appeal is from the judgment, for the purpose of reviewing the order.

The complaint alleges that one John L. Flaherty, the son of defendant, was duly committed to the state insane asylum at Napa by order of the superior court, where he was regularly detained, supported, and maintained in pursuance of said order; that he had not, at the date of said commitment, and has not since, had any wife, child, or children of sufficient pecuniary ability to support him at said asylum, and that defendant is of sufficient ability, and is liable, under section 8 of the Insanity Law of 1889 (Stats. 1889, p. 330), which reads as follows: "If indigent insane persons have kindred of degree of husband, wife, children, other than minors, father, or mother, living within this state, of sufficient pecuniary ability, who are otherwise liable, such kindred, in the order above named, shall support such indigent insane person by paying to the board of directors or board of trustees, as the case may be, of the asylum to which such insane person has been committed or removed, the sum per month fixed on by them, quarterly, in advance, for the maintenance and support of such indigent insane person, and such kindred, in the order above named, shall also pay for the clothing as the resident physician of such asylum shall from time to time furnish to such indigent insane person."

The demurrer was upon the grounds (among others) that the complaint does not state facts sufficient to constitute a cause of action, and that the plaintiff has not the legal capacity to sue. As we have concluded that the demurrer was properly sustained upon the latter ground, it will not be necessary to consider whether or not the complaint states facts sufficient to authorize the proper party to maintain the suit in the proper court.

Section 9 of the law of 1889 is as follows: "For a failure to perform the duty devolving upon such kindred under the provisions of this act, an action may be brought by the board of trustees or board of directors, as the case may be, of the asylum to which such insane person has been committed or removed, in their own names, against said kindred, in the order above named. Such action may be prosecuted in the superior court of any county in this state in which said kindred, or either of them, may reside, and in which the action shall be brought, which action shall be conducted throughout, and the judgment therein enforced, as in a civil action for the recovery of a debt."

The right to maintain any action against the father for the support of an adult child, if any such right exists, is

purely a creation of the statute. No such right existed at common law. If it be conceded that such right exists by virtue of section 8, herein quoted, the remedy is given under section 9, which authorizes the board of directors or board of trustees to bring the action in their own names.

There is no question but that this would be so, if the law of 1889 were still in force in all its parts, and if it were the only insanity law found in the statutes. There is no claim made that the law of 1889 authorized the treasurer of the asylum to bring or maintain the action. The legislature, however, by an act approved March 31, 1897 (Stats. 1897, p. 311), known as the Insanity Law, undertook to provide for the government of the several asylums for the insane of the state, the admission of patients thereto, the names of the officers and assistants, and many other matters of detail. This latter act is divided into several articles, and each article into many sections, taking up some twenty-two pages of the statutes. It expressly repealed all acts and parts of acts in conflict with its own provisions. It certainly was an attempt at a revision of the laws relating to the government and management of asylums for the insane. Counsel for appellant say, in their opening brief, "When the Napa state hospital came into existence by the laws of 1897, the Napa state asylum no longer continued to exist. The ends for which it had been created no longer existed, and the laws by which it had been created were expressly repealed by the law of 1897. If the act creating the Napa state asylum is repealed, that institution no longer exists, and it necessarily follows, as a legal sequence, that on the enactment of the Insanity Law of 1897, the board of trustees of the Napa state asylum, as such, went out of existence also, and by no legal fiction can it be assumed that any authority which they once possessed could survive them."

If we were to concede, as claimed by appellant's counsel in their opening brief, that the entire act of 1889 was repealed by the act of 1897—and this court has very strongly so intimated in *People v. King*, 127 Cal. 574—then the right to recover of defendant is lost. It is a rule of almost universal application that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause. (Sutherland on Statutory Construction,

secs. 162, 163; Endlich on the Interpretation of Statutes, secs. 478, and cases in notes.)

It was said by Tindal, C. J., in *Kay v. Goodwin*, 6 Bing. 576, 4 Moore & P. 341, that the effect of repealing a statute is "to obliterate it as completely from the records of the Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

This language was quoted with approval by this court in: *Spears v. County of Modoc*, 101 Cal. 305, in which it was held that the repeal of an ordinance, pending an appeal from a judgment imposing a fine thereunder, had the effect to remit the penalty and destroy the judgment.

Counsel for appellant, in their reply brief, in order to avoid the result of what has been said, contend that the right which accrued to the trustees of the asylum under the act of 1889 has passed to and is now possessed by the Napa state hospital, under the law of 1897. They say: "A careful examination of all the statutes on the subject will demonstrate that, as we think, the Insanity Law of 1897 is not as comprehensive as is supposed. It does not contain all the law on the subject, and is, when carefully examined, seen to be, not a complete scheme containing all the law on the subject of the insane, but it is in fact intended to provide simply for the management of the institutions."

If it be conceded that the act of 1897 did not repeal the right that had accrued under the act of 1889, it must follow that it did not repeal the method of enforcing the right. The liability is claimed to exist under section 8 of the law of 1889. The method of enforcing the right is given by section 9. There is no reason why section 8 should remain unrepealed and section 9 be considered as repealed.

The board of trustees of the hospital is not abolished by the act of 1897. The act denominates the board as "trustees or managers," and says "such trustees or managers shall hereafter be termed managers." And it is provided that the act shall not affect the "salary of any officer elected by existing boards of trustees or directors of asylums of this state during their present term of office."

The right to maintain this action is claimed to exist under section 13 of article II of the act of 1897, which pro-

vides that the treasurer may, with the consent of the attorney-general, bring an action, in the name of the hospital, to recover, for the use thereof—1. The amount due upon any note or bond in his hands, belonging to the hospital; 2. The amount charged and due, according to the by-laws of the hospital, for the support of any patient therein, or for the actual disbursements made in his behalf for clothing and traveling expenses; 3. Upon any cause of action accruing to the hospital.

Neither of the above subdivisions authorizes the treasurer to bring this action as to the amount claimed to have accrued under the act of 1889.

It is not due upon any note or bond. It is not due, according to the by-laws of the hospital, for that part of the amount claimed under the act of 1889. The cause of action, under the last-named act, did not accrue to the hospital, but if it accrued at all, it accrued to the board of trustees or directors of the Napa state asylum for the insane.

If the right to recover the amount due under the act of 1889 passed to the Napa state hospital under the act of 1897, the right to recover in the name of the trustees also passed to the said hospital. The treasurer can maintain no action on behalf of such hospital, except under express authority of the statute. If it be claimed that as to the portion of the claim alleged to have accrued after March 31, 1897, it accrued to the Napa state hospital, and that the treasurer has under said last-named act the power to recover the amount, still he cannot maintain this action, for the superior court has no jurisdiction. The amount, according to the amended complaint, that accrued after March 31, 1897, is \$192.50. The superior court has no jurisdiction in such case. (Const., art. VI, sec. 5.)

The judgment should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Garoutte, J., Harrison, J., Van Dyke, J.

[Sac. No. 887. Department One.—October 11, 1901.]

In the Matter of the Estate of ABRAHAM BOOTH BENNETT, Deceased. EMILY BENNETT MORRIS, named EMMA MORRIS in Will, and JAMES H. BENNETT, Appellants. THEODORE A. CARMAN et al., Respondents.

WILL—CONSTRUCTION—DEATH OF LEGATEE—BEQUEST TO “REVERT” TO “CHILDREN OF THE FAMILY.”—Under the will of a testator who had never married, and had no family of his own, and whose father’s family had ceased to exist as such before the will was made, a provision that in case of the death of any legatee before distribution, “the portion so bequeathed to such legatee shall revert to the family of which such legatee is a member, share and share alike,” the word “revert” is not to be construed in the legal and technical sense of “coming back” to its original position as part of the testator’s estate, but in the sense of the word “go,” and the “family” referred to is that of the deceased legatee, and not that of which the testator had been a member.

ID.—MEANING OF “FAMILY.”—The word “family” is not a technical word. It is of flexible meaning, which is to be determined from the context and the subject-matter to which it relates, and depends upon the particular circumstances of the case. In common parlance, it imports those who live under the same roof with the *pater-familias*; and those who branch out and become members of new establishments cease to be a part of the father’s family, in the common meaning of the word. The word may import parents with their children, whether living together or not, or the offspring of a common progenitor, if such intention is manifested from the context.

ID.—CONSTRUCTION OF CODE—DEATH OF DEVISEE OR LEGATEE DURING LIFE OF TESTATOR—SUBSTITUTION—POWER OF PROVISION.—Section 1343 of the Civil Code, providing that “if a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place,” only declares the effect of such death, where the testator makes no provision for the contingency, and is not a limitation upon his power to make such a provision, by devise or bequest over to the children of the devisee or legatee.

APPEAL from a decree of the Superior Court of San Joaquin County distributing the estate of a deceased person. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

Louttit & Middlecoff, for Appellant Emily B. Morris.

R. C. Minor, for Appellant James H. Bennett.

A. H. Ashley, Attorney for Carman Legatees, Respondents.

H. R. McNoble, Attorney for other Legatees, and Heirs, Respondents.

HARRISON, J.—The question involved in this appeal is the construction to be given to one of the clauses of the decedent's will. The will is olographic, and dated March 1, 1895. By it the testator, after bequeathing five hundred dollars to a Mrs. Fanning, five hundred dollars to his half-brother, James Bennett, one thousand dollars to his half-sister, Emma Morris, and five hundred dollars to his niece, Alzadie B. Morris, gave the residue of his estate to his sister, Frances Ann Carman, of Hempstead, in the state of New York. After making this disposition of his estate, he added the following clause: "In case of the death of any of the legatees of my estate under this will before distribution, then and in that case the portion so bequeathed to such legatee shall revert to the children of the family of which such legatee is a member, share and share alike." The residuary legatee, Mrs. Carman, died October 31, 1897, after the making of the will, and during the lifetime of the testator, leaving eight children surviving her. The testator died April 26, 1899. The testator had had four brothers and sisters of the whole blood, who died prior to the making of the will, each of whom left issue now living. The brother and sister of the half blood named in his will are living, and issue of each of them is also now living, the niece named in the will being the daughter of the half-sister. The four specific legacies have been paid to the respective legatees, and by the decree of distribution the residue of the estate was distributed to the eight surviving children of Mrs. Carman. James H. Bennett and Emma Morris, the brother and sister of the half blood, have appealed, claiming that the whole of the residue should have been distributed to them.

In support of their appeal, it is urged that, under a proper construction of the will, it was the intention of the testator that his estate should go to the surviving members of his own family, rather than to his relatives in a more remote de-

gree; that by directing that in a certain contingency his bequests, including the residue, should "revert," he indicated his wish that this residue should "come back" to its original position as a portion of his estate, and thence go to the appellants as the only surviving children of the family of which the testator was a member.

Such a construction of the will, however, requires a transposition and substitution of words and clauses, which is not necessary, even if it were permissible. If the testator had used the word "go" instead of "revert," there would have been no room for the contention of the appellants; and it is much more consistent with the rules of interpretation to hold that he used the word "revert" with that meaning, than it would be to hold that by the phrase, "family of which such legatee is a member," he intended the family of which his father in his lifetime had been the head, and of which he and the appellants were the only surviving members. It is manifest that he did not use the word "revert" in any technical or legal sense. (See Civ. Code, sec. 768.) He did not intend that in the contingency named either of his bequests should fall into his general estate, but was designating the legatees who should be substituted for the one who might die before distribution. His declaration that it should revert to persons other than himself indicates that the term was used merely to signify that they were the persons to whom he wished the property to be given. The legacy had never been the property of the children thus designated, and, consequently, could not technically revert to them, and his use of this word was merely an expression of his intention that it should "go" to them. In *Beatty v. Cory Universalist Society*, 39 N. J. Eq. 452, the will provided that in case of the death of the legatee before majority, the legacy should "revert back" to his other lawful heirs. It was held that by the term "revert" the testator meant "go to" the other heirs. The same construction was given to the word, in a will, in *Jiggetts v. Davis*, 1 Leigh, 368, and in *Bates v. Dewson*, 128 Mass. 334.

The provision substituting "the children of the family of which such legatee is a member," as the recipient of the legacy in case of the death of any of the designated legatees, is an awkward and inartificial expression, but is not incapable of construction. It must be borne in mind that this expression is not limited to the case now before the court, but was intended by the testator to apply to each of the

legacies contained in the will, and a very slight consideration will show that the construction contended for by the appellants would thwart the manifest intention of the testator in reference to some of these legacies. The construction of the phrase turns upon the meaning in which the word "family" is used therein. The meaning which is to be given to the word is to be determined by the context, and also from a consideration of the subject-matter to which it relates. Every case must depend upon its particular circumstances. Mr. Jarman says (Jarman on Wills, *941): "'Family' is not a technical word, and is of flexible meaning." Anderson's Law Dictionary defines the word: "In its modern comprehensive meaning, a collective body of persons living together in one house." It is sometimes used to include parents with their children, whether dwelling together or not. The word has also a broader and secondary meaning, which includes all the offspring or descendants of a common progenitor, but is not to receive this construction unless such intention is manifested from the context. (*Dodge v. Boston and Providence etc. R. R. Co.*, 154 Mass. 299. See also *Bowditch v. Andrew*, 8 Allen, 339; *Bradley v. Andrews*, 137 Mass. 50; *Townsend v. Townsend*, 156 Mass. 454; *Smith v. Wildman*, 37 Conn. 384; *Wood v. Wood*, 63 Conn. 324; *Old People's Society v. Wilson*, 176 Ill. 94; *Hall v. Stephens*, 65 Mo. 670.¹) In *Rex v. Darlington*, 4 Term Rep. 797, Lord Kenyon said: "In common parlance, the family consists of those who live under the same roof with the *paterfamilias*—those who form, if I may use the expression, his fireside. But when they branch out and become the members of new establishments, they cease to be a part of the father's family."

In the present case the testator had no family of his own. He left the place of his childhood and came to California in 1849, and it does not appear that after that date he ever lived with any member of his father's family. He was never married, and for many years before his death lived in the household of Mrs. Fanning, one of the legatees, who was in no wise related to him. His father, mother, and stepmother, together with all of his brothers and sisters of the whole blood, had died many years before he made the will in question. His half-brother lives on Long Island, and his half-sister in San Francisco. Upon these facts it must be held that his father's family, of which he and Mrs.

¹ 27 Am. Rep. 302.

Carman had once been members, had ceased to exist, and was not the "family" referred to in the clause, "children of the family of which such legatee is a member," and that the appellants are not the children of the family referred to therein. As before the making of his will his father's family had ceased to exist, and Mrs. Carman had become the head of a new family embracing the eight children then living, it must be held that this was the family referred to in the clause, and that her children are the children to whom he intended that the bequest should go in case she should die before the distribution of his estate.

The provision in section 1343 of the Civil Code, that "if a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place," has no application. That section only declares the effect of the death of a legatee in case the testator makes no provision for such contingency, but is not to be construed as a limitation upon the power of the testator to make such provision. In the present case the testator has carefully provided for this contingency, and has thus taken the will out of the provisions of this section.

The order appealed from is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 803. Department One.—October 11, 1901.]

JOHN F. SNYDER, Respondent, v. HOLT MANUFACTURING COMPANY, Appellant.

ACTION FOR PERSONAL INJURIES—DEFECTIVE BOLT AND NUT IN HARVESTER—EXPERT EVIDENCE.—In an action for personal injuries, caused by reason of the separation of a defective bolt and nut used to connect the header and separator in a side-hill combined harvester, manufactured for and sold to the plaintiff by the defendant, the question whether the bolt and nut were proper and sufficient for the coupling together of the parts of the harvester is peculiarly one for the evidence of a qualified expert, experienced in the construction of such machinery for the purpose intended.

Id.—WRITTEN CONTRACT OF SALE—EVIDENCE—CIRCUMSTANCES ATTENDING SALE—INTENTION OF PARTIES.—The written contract of sale of the harvester may be explained by reference to the circumstances under which it was made, and the matter to which it relates; and evidence of the circumstances attending the sale is admissible to aid the court in arriving at the intention of the parties in the purchase and sale of a harvester manufactured by the vendor, of a peculiar build, and intended for a particular purpose.

Id.—WARRANTY OF HARVESTER—CODE PROVISIONS PART OF CONTRACT.—Where the contract expressly warranted the machines “to be made of good material, and durable with proper care,” and the circumstances proved showed that the machine was manufactured and sold by the vendor for a particular purpose, the provisions of section 1769 of the Civil Code, warranting the sale of an article of the seller’s manufacture “to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture,” and of section 1770 of the same code, that “one who manufactures an article for a particular purpose, warrants by the sale that it is reasonably fit for that purpose” are applicable, and enter into and form part of the contract of sale.

Id.—QUESTIONS FOR JURY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PATENT DEFECT.—The questions whether the defendant was guilty of negligence in the construction and manufacture of the machine, and whether the defect was sufficiently patent to charge the plaintiff with contributory negligence, were questions of fact for the jury to determine, and not questions of law for the court, where different conclusions upon those questions might be rationally drawn from the evidence.

APPEAL from an order of the Superior Court of Stanislaus County denying a new trial. William O. Minor, Judge.

The facts are stated in the opinion of the court.

Budd & Thompson, Maddux & Stonesifer, and C. A. Stonesifer, for Appellant.

W. H. Hatton, and Needham & Dennett, for Respondent.

VAN DYKE, J.—The action is for damages, alleged to have been sustained by the plaintiff by reason of the defective construction of a combined harvester manufactured and sold to the plaintiff and one Kniebes by the defendant corporation. The plaintiff and said Kniebes were farmers near Crows Landing, in Stanislaus County, in the spring of 1896. By agreement between them, the plaintiff went to Stockton the latter part of April of that year, to make arrangements for a harvester to be used by them. The defendant was at

that time, and for many years prior thereto had been, engaged in manufacturing and selling combined harvesters. The plaintiff's land, as also that of his neighbor Kniebes, was hilly, and they wished to obtain a harvester that would operate upon a side hill, to cut grain growing on hilly ground. He met a Mr. Dickenson, secretary of the defendant company, who informed him that defendant was building a single-wheel side-hill combined harvester especially for cutting grain on hilly ground, and showed the plaintiff the separator of such single-wheel combined harvester. Later on, the plaintiff saw Benjamin Holt, president of the defendant corporation, and told him the kind of ground he wanted the harvester to operate on. Subsequently, May 4, 1896, Mr. Tuggle, agent of the defendant, came to plaintiff's place to see the ground the harvester was needed to harvest grain on, and said Tuggle stated that the machine would cut the grain growing on the land mentioned, but that there was a good deal of work yet to be done on the single-wheel side-hill harvester, but he thought it could be finished by May 20th, or a few days later. Thereupon plaintiff and his neighbor Kniebes signed a formal application for the purchase of said single-wheel side-hill harvester. About June 9, 1896, the harvester arrived by rail at Crows Landing, and, a day or two thereafter, was unloaded and taken to plaintiff's ranch, and said Tuggle, sent by defendant for that purpose, set up the harvester and started it to harvesting. It was first operated upon the farm of Mr. Kniebes. It was then taken to the plaintiff's field, and the grain was cut around the base of the hill on which the harvester afterwards broke down. Mr. Tuggle left on Tuesday, and the plaintiff took charge of the harvester and operated the same until the break. This was caused, it appears, by the header breaking loose from the separator, occasioned by a nut from the bolt connecting the two coming off, resulting in the separator tilting suddenly down-hill, throwing the plaintiff into the cylinder-house, where he was caught by the teeth of the cylinder, and his right leg was very badly lacerated and mangled, inflicting permanent injuries.

The action was tried by a jury, and a verdict awarded the plaintiff in the sum of two thousand dollars. The court below denied a motion for a new trial and the defendant appeals.

The appellant claims that the trial court erred in the admission of the testimony of the witness Ingersoll as expert

testimony, on the ground that it was not a case for expert testimony, but a question entirely for the jury, upon the facts whether there were defects or negligence in the construction of the harvester or not. The witness fully qualified himself as an expert. It was shown that he had had a large amount of experience in the construction and operation of harvesters, and his testimony was directed to the proper construction and sufficiency of the bolt and nut in question. It is also claimed that the nut examined by the witness Ingersoll was not shown to be the nut on the bolt at the time of the accident. He testified that he found the nut on the ground a few feet above where he found the separator, and it was argued that the nut could not roll up hill. But it appears that after the breakdown caused by the nut coming off, the separator rolled down-hill. Besides, Mr. Tuggle, defendant's agent, found the nut and washer on the timber where Ingersoll had left them, and put them on the bolt, no question being raised at the trial that the nut found by Ingersoll was not the one in use on the bolt. In the case of *Kauffman v. Maier*, 94 Cal. 269, relied upon by the appellant, where it was held that expert testimony was improper, the court say: "An answer to the question did not involve the knowledge of any science or art, and was not the subject of testimony by an expert in machinery. The facts sought to be shown by the testimony did not involve a knowledge of the construction or working of machinery, or in any respect depend upon such knowledge." Whether the bolt and nut were proper and sufficient for the coupling together of the two pieces of machine in this case, were peculiarly questions for one experienced in the construction and manufacture of such machinery for the purposes intended. The case, therefore, is clearly distinguishable from those relied upon by appellant.

It is contended, also, that the court erred in allowing testimony in reference to previous negotiations, inasmuch as they were superseded by the written contract. This contract consists entirely in the written application for the purchase, signed by the plaintiff and his co-purchaser, Kniebes. The testimony shows that there were negotiations pending some time before the order for the machine, and that the agents of the defendant visited and inspected the ground of the plaintiff and Kniebes on which it was intended that the harvester should operate, and after the negotiations were

completed, having been assured by the defendant's agents that the machine in question would answer the purpose intended, the order was filled up by an agent of the defendant and signed by the purchasers. It reads: "Please ship to the undersigned one side-hill single-wheel combined harvester, fourteen-foot cut, with four-feet extension, complete with straw-dump and header-truck." And the form signed by the purchasers contains this agreement on the part of the manufacturer and vendor: "These machines are all warranted to be made of good material, and durable with proper care." The rule that the intention of parties is to be ascertained from the writing alone, where a contract is reduced to writing, is subject to other rules of law for the interpretation of contracts. "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." (Civ. Code, sec. 1647.) It appears that this machine was one of a peculiar build, and intended for a particular purpose, and it was entirely proper to have all the facts and circumstances laid before the court, in order to arrive at the intention and understanding of the parties. "One who sells, or agrees to sell, an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein." (Civ. Code, sec. 1769.) Again, "One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose." (Civ. Code, sec. 1770.) The facts in this case make these provisions of the law applicable, and they enter into and form a part of the contract of sale by the defendant in this case.

But it is contended that there was no negligence on the part of the defendant; that the defect, if any, was a patent one, of which the plaintiff could have taken notice. The question whether the defendant was guilty of negligence in the construction and manufacture of the machine, as well as the question whether there was contributory negligence on the part of the plaintiff, were issues made by the pleadings and submitted to the jury. "The rule is, that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. This proposition has

been frequently declared by this court." (*Herbert v. Southern Pacific Co.*, 121 Cal. 227.) In support of the foregoing rule stated by the court, a large number of cases are cited. This same rule is stated in *Buchel v. Gray Brothers*, 115 Cal. 422, the court saying: "As has often been observed, the question of negligence is peculiarly for the jury. Even when the evidence is not conflicting, the verdict will not be disturbed, if different conclusions can reasonably be drawn therefrom." By the verdict of the jury it was found that the plaintiff's injury was not caused by his own negligence, but arose in consequence of the negligence of the defendant in the construction and manufacture of the machine sold to him, and it cannot be said that the jury were not justified in so finding, from all the facts and circumstances of the case.

Order affirmed.

Garoutte, J., and Harrison, J., concurred.

Hearing in Bank denied.

[Sac. No. 915. Department One.—October 11, 1901.]

P. McDONNELL, Respondent, v. P. GILLON, Appellant.

STREET-IMPROVEMENT—SEWERS—FLUSH-TANK—INSUFFICIENT DESCRIPTION IN RESOLUTION—VOID BID AND CONTRACT.—A resolution of intention to improve certain streets by constructing sewers thereon, with cribbing, manholes, and a flush-tank, which wholly fails to describe the dimensions of the flush-tank, or the materials from which it is to be constructed, or where or how it is to be connected with any one of the sewers, or to show whether one flush-tank would serve for all of them, and which is not aided in description by any specifications therefor, fails to describe a material part of the work; and such failure vitiates the resolution as a whole, and renders void a bid and contract to do the work proposed by the resolution, inclusive of the flush-tank.

ID.—RESOLUTION OF INTENTION JURISDICTIONAL—CARE IN DESCRIPTION.—The resolution of intention is the initial step, by which alone the board acquires jurisdiction to order the work done, and it must so describe it as to convey an intelligent idea of the improvement, and its nature and extent. A little more care in this initial and jurisdictional step would protect all parties, and avoid all question, by a proper description of each distinct part of the proposed improvement.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion.

Stoney & Stoney, for Appellant.

L. G. Harrier, and Coghlan & Harvey, for Respondent.

CHIPMAN, C.—Action to foreclose a lien for street-assessment for the construction of certain sewers and other work in the city of Vallejo. Plaintiff had judgment, from which defendant appeals.

The resolution of intention described certain sewers; namely, a sewer 800 feet along the center of Main Street; a sewer 365 feet along Sonoma Street; a sewer 365 feet along a certain alley; a sewer 720 feet “along the center line of Sutter Street, to and extending into the bay of Vallejo to the middle intersection of Maryland and Sutter streets, a distance of 700 feet, including 100 feet cribbing.” These sewers were of different dimensions. Also, “one manhole, to be constructed 4 feet, inside diameter, at the middle intersection of Main and Napa streets”; two other manholes, similarly described, at the intersection of other streets; also, “one flush-tank, to be constructed at the corner of El Dorado and Main streets.”

Appellant contends that the notice of intention failed to “describe the work” as to the manholes, the flush-tank, and the cribbing.

It is well settled that the resolution of intention should so describe the work as to convey an intelligent idea of the improvement and its nature and extent. The resolution is the initial step, and by it alone the board acquired jurisdiction to subsequently order the work done. (*Schwiesau v. Mahon*, 128 Cal. 114; citing *Bolton v. Gilleran*, 105 Cal. 244.¹ See also *Fay v. Reed*, 128 Cal. 357, and *Bay Rock Co. v. Bell*, 133 Cal. 150.)

Respondent contends that *Perine v. Forbush*, 97 Cal. 312, “recognized the right to have a piece of street-work regarded as an entirety,” and that the manholes, flush-tank, and cribbing were but necessary parts of the sewers, and “reasonably related thereto,” from which we suppose it is intended to be understood, that if the sewers are sufficiently described, their

¹ 45 Am. St. Rep. 33.

several necessary parts would also be described. One of the sewers was to be constructed of terra-cotta pipe; one of iron-stone sewer-pipe; two of vitrified salt-glazed ironstone.

There is no description of the dimensions of the flush-tank nor of the material from which it is to be constructed, nor how or where it is to be connected with any one of the sewers. All that is said about it is: "One flush-tank, to be constructed at the corner of El Dorado and Main streets." Can it be claimed that we must infer that it was to be constructed of the same material as the sewers? If so, which one of them? It is not at all likely, however, that this flush-tank would be built of the material used in any one of the sewers.

There are many sewers without flush-tanks; they form no necessary part of a sewer. In the present case, there appears to be but one, while there are four different sewers; whether one flush-tank would serve for all of them does not appear. We are not aided by any description of this tank by referring to the specifications, if we were permitted to look there in aid of the resolution,—which we are not, for no description is there given, other than appears in the resolution,—and in plaintiff's bid for the work he simply says, "Flush-tank, \$50."

It may be understood from the resolution, in using the words, "one flush-tank, to be constructed at the corner of El Dorado and Main streets," that the purpose was to erect a receptacle in which water could be stored and thence forced through the sewer to cleanse it and free it from noxious accumulations. But the dimensions and material and possible cost could not be understood; nor can it be said that the description, "one flush-tank, to be constructed," would at once convey to the mind the nature and character of the work and the materials to be used in the construction. We do not think that the flush-tank was sufficiently described, and it becomes unnecessary to pass upon the other objections made by appellant.

It was held in *Fay v. Reed*, 128 Cal. 357, that a failure of description in any material part of the work vitiates the resolution as a whole, and renders void a bid and contract to do the work proposed by the resolution, inclusive of the defective part. So held, also, in *Bay Rock Co. v. Bell*, 133 Cal. 150.

Respondent refers to recent decisions of the court, in con-

struing the statute, as imposing "hard conditions"; that they are in "such strong contrast with previous rulings of the supreme court of the state, that their application to these proceedings appears to be *ex post facto*." And it is asked, "If a man works and acts according to the law as laid down and interpreted by the highest authority, and is then wrong, when can he be safe?" The recent decisions to which respondent refers rest upon a long line of cases holding uniformly to substantially the same construction of the law. In truth, appeals involving the question here presented are the result of inattention to the requirements of the law in preparing the resolution of intention. How easy it would have been to avoid all question in this case, by saying in the resolution: One brick man-hole (giving dimensions) with iron cover; one flush-tank (giving dimensions, or capacity in gallons), to be constructed of (giving materials); a sewer, etc., including 100 feet of cribbing, to be constructed of (giving materials of cribbing). A little more care in the initiatory step would protect all parties, and prevent appeals such as the one before us, and would relieve the court from the disagreeable necessity of holding assessments to be void.

It is advised that the judgment be reversed.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. 2716. Department Two.—October 11, 1901.]

In the Matter of the Estate of MORRIS FREUD, Deceased,
WARNER BROTHERS COMPANY, Appellant. TINY
FREUD, Respondent.

**ESTATES OF DECEASED PERSONS—PARTIAL DISTRIBUTION—PETITION BY
WIDOW—CONTINUANCE—APPEAL FROM JUDGMENT—ESTOPPEL.**

Upon petition by the widow for partial distribution of real property of her deceased husband, alleging that the property was community property, and that under the will she had a life estate in the interest devisable by her husband, an application for a continuance by a grantee of one of the devisees, on the ground that an appeal was pending from a judgment adjudging that she had only a life estate in the entire property, in an action brought by such grantee to cause the executrix widow and other devisees to make redemption of such real property from a sale under the foreclosure of a mortgage thereupon, or be forever barred from such right, was properly denied. Such judgment, if it should be affirmed, could not be pleaded or admitted in evidence as an estoppel upon the widow to claim more than a life estate upon distribution of the estate.

ID.—ACTION TO FORECLOSE RIGHT OF REDEMPTION—TITLE INCIDENTALLY INVOLVED.—In the action to compel redemption, or a foreclosure of the right of the defendants to redeem the property, the respective rights of the parties in the property were only incidentally involved. The executrix could make the redemption to protect the estate, and where she did so, the judgment fixing the rights of the devisees to contribute toward the redemption could not be a conclusive adjudication of their respective interests in the property of the estate.

ID.—EXCLUSIVE JURISDICTION OVER ESTATE.—The court, in the action to foreclose the right of redemption, had no jurisdiction to determine the matter involved in a distribution of the estate of the decedent. The court, having probate jurisdiction over the estate, has exclusive jurisdiction over the question of distribution thereof, and to determine the interests of the distributees in the property distributed.

ID.—IMPROPER DECREE OF PARTIAL DISTRIBUTION—ORDER OF SALE—APPEAL.—A decree of partial distribution of real property is improper, where the court has ordered such property to be sold to pay debts and the expenses of administration. The fact that such order is suspended by an appeal would not justify a distribution which would defeat the order of sale if it should be affirmed.

APPEAL from a decree of the Superior Court of the City and County of San Francisco making a partial distribution of the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Hart H. North, Henry E. Monroe, and W. B. Treadwell,
for Appellant.

W. S. Goodfellow, for Respondent.

TEMPLE, J.—This is an appeal by the grantee of one of the heirs of Morris Freud, deceased, from a decree of partial distribution. Two points are made: That the court erred,—1. In refusing a continuance; and 2. In distributing the property in the face of an unexecuted order by the court requiring the sale of the property distributed, to pay debts and expenses of administration.

Morris Freud died testate, and his will, after certain provisions, unimportant here, gave his entire estate to his widow for life, in trust, remainder to his five children. Appellant has acquired the interest of Jacob Freud, one of the children. The widow presented to the probate court a petition for partial distribution of certain real property, and in her petition averred that the property was community property, and that she had, under the will, a life estate in the interest devisable by her husband. At the hearing of the petition, the appellant asked for a continuance until the final determination of a case then pending on appeal in the supreme court, in which appellant here was plaintiff, and Tiny Freud, said widow, and others were defendants, "on the ground that in and by the judgment and decree in said action, it was, among other things, determined and adjudged that the interest of said Tiny Freud in and to the real property described in said petition was a life estate only, and that she did not, and does not, own any other interest therein, and that said judgment, pending the appeal therefrom, could not be pleaded or introduced in evidence as an estoppel in this proceeding."

The judgment roll in the case alluded to was read, and the fact of the appeal was admitted. That action was brought by this appellant, against Mrs. Freud and her four children, other than Jacob, to have the amounts fixed which the several defendants ought to pay, or to contribute toward the redemption from a foreclosure sale of the land here sought to be distributed.

To enable the court to determine the amount which each ought to pay, the plaintiff in that action set out what he assumed to be the interest of each of the parties in the land,

the redemption of which was sought. He averred the former ownership of Morris Freud, deceased; that he died testate; and, among other things, "that, by his last will and testament, the said Morris Freud devised the said lot of land to the defendant Tiny Freud for and during the term of her natural life, and the remainder thereof, after her death, to the defendants," his children, in equal shares. This allegation was not denied by the defendants, and the findings and decree entered incorporated in them the allegation as a fact, and decreed that Tiny Freud owned a life estate in the real property here involved.

In accordance with such finding, the court fixed the amount which each was to pay to effect a redemption. The sum which the appellant would have received to effect the redemption, if one had been made by the defendants in that suit, as heirs, was much less than it would have been had Tiny Freud then claimed, and established her claim to, one half the property as survivor of the community. The redemption was in fact made by the executrix for the estate, so that appellant, who had himself redeemed as a devisee, was paid the amount advanced by it, with percentage and costs.

The application for a continuance was properly denied, if from the facts shown it appears that the judgment, when it becomes final, assuming that it may be affirmed, would not estop Tiny Freud and prevent her from claiming more than a life estate. It is clear to me that it could not have that effect. The purpose of the action was to cause the defendants therein named to redeem, or to be forever barred from such right. It was an action to foreclose. The respective rights of the parties in the property were only incidentally involved. A redemption could have been made by the executrix of the estate, as it finally was. We may well suppose that the devisees, not having the means to redeem, would take very little interest in the matter. This illustrates very well the difference between a question incidentally involved and one directly involved, and also why, as to those incidentally involved, the adjudication is conclusive in another suit, based on a different cause of action, only when the matter was actually litigated.

And then the court, in that proceeding, had no jurisdiction to determine the matter involved in a distribution. The probate court has exclusive jurisdiction of that, and cannot be deprived of its power in this way. The exclusive jurisdic-

tion of that court over these matters was asserted in *Goad v. Montgomery*, 119 Cal. 552,¹ and it was so expressly held in *Toland v. Earl*, 129 Cal. 148.²

I cannot do better upon this proposition than to quote from Van Fleet on Former Adjudication, 3-8. It was said in the *Duchess of Kingston's Case*, 20 How. St. Tro. 353, "that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court. . . . The correct principle involved, in my opinion, in the phrase, 'court of concurrent jurisdiction;' was first formulated by a British court sitting in India, as follows: 'In order to make the decision of one court final and conclusive in another, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is put in evidence as conclusive.' This formula has been affirmed twice by the court of Indian appeals. It was also said in the opinion in the *Duchess of Kingston's Case*, by way of illustrating the rule that a decision upon an incidental point, by a court which had no jurisdiction to pass upon it directly, was no evidence in a court which did have such jurisdiction; that if that were not true, then the determination of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement of a pauper, might be offered in evidence, and give the law to the highest criminal court in the kingdom." Other similar illustrations are given by the learned author, but none show the irrationality of the proposition more strikingly than is shown here, where the exclusive jurisdiction of the probate court is attempted to be forestalled by a judgment in a proceeding where the rights of the parties were only incidentally involved. (See also *Law of Res Judicata*, by Hukm Chand, 1, 391.)

The action was not brought under section 738 of the Code of Civil Procedure. What effect a judgment in a suit to quiet title under that section would have upon the distribution subsequently made in the probate court is not involved.

It is true, the case here is, not that the same court could not have entertained the same proceeding for distribution, but that a special proceeding *in rem* has been provided, in which distribution must be made. But the same reasons

¹ 63 Am. St. Rep. 145.

² 79 Am. St. Rep. 100.

would plainly exist in this case for refusing to receive a judgment in evidence as *res adjudicata*, as in the case where the first court did not have jurisdiction of the matter involved in the subsequent proceeding.

For these reasons the court did not err in refusing a continuance.

Objection was made to the proposed distribution, on the ground that the court had ordered the very property of which partial distribution was sought, to be sold by the executrix to pay the debts and expenses of administration.

The fact that such an order had been made is recited in the decree of distribution which the court made, notwithstanding the objections. It is there stated that all the parties interested in having the sale made consented to the distribution. But the appellant, who was then in court, and urging the objection, was interested. If the debts exist, they must be paid in some mode, and if this property can be and is allowed to pass out of the estate, other property must be sold. The bond given by the distributee would be no security to other devisees. It has been held that such a decree is mandatory upon the administrator. (*Estate of Spriggs*, 20 Cal. 121; *Halleck v. Moss*, 22 Cal. 266). Such, often, must be the nature of the decree, for it is sometimes procured against the wishes of the personal representative, in the interest of creditors, in the way of collecting their claims.

Although the order of sale had been made, an appeal from it had been taken to this court, and that appeal was pending when this decree was entered. The effect of the decree was suspended by the appeal, but that fact would not justify the probate court in so disposing of the property as to defeat the execution of the decree in case of its affirmance. (*Estate of Garraud*, 36 Cal. 277.)

The order is reversed.

McFarland, J., and Henshaw, J., concurred.

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[S. F. No. 2437. Department Two.—October 11, 1901.]

SUSAN KRASKY, Respondent, v. CHARLES WOLLPERT, Appellant; and H. A. KRASKY, Respondent.

ACTION UPON FIRM NOTE—EVIDENCE OF COPARTNERSHIP—SUPPORT OF FINDING.—In an action upon a firm note, executed in the name of one of the defendants by him, evidence that such name was a firm name, and that the defendants were associated together in such name for the purpose of carrying on business together and dividing the profits between them, and that the defendant who executed the note in such name was the managing partner, and that the note in suit was made by him as a member of the firm, and that the other defendant recognized the copartnership, is sufficient to support a finding that they were copartners under that firm name when the note was executed.

ID.—INDIRECT FINDING AS TO EXECUTION OF NOTE BY FIRM—ADVERSE COMPLETE FINDING—PREJUDICE NOT PRESUMED.—The finding that, as a member of the firm of copartners, the defendant named executed the promissory note sued upon, is the equivalent of a finding that the copartners made it; and the failure to find directly and positively that the note was executed by the firm cannot be presumed prejudicial to the appellant, where it is evident that a more complete finding would be adverse to the appellant.

ID.—CONSTRUCTION OF FINDINGS—INFERENTIAL FINDINGS.—The findings, in so far as they are not positive and certain, should receive a construction which will uphold rather than defeat the judgment; and where, from the facts found, other facts may be inferred which will support the judgment, the inference will be deemed to have been made by the trial court.

ID.—SETTING ASIDE FINDINGS AND JUDGMENT—NEW FINDINGS AND JUDGMENT—POWER OF COURT—VOID ACTION—APPELLANT NOT PREJUDICED.—Where the court in such action set aside the findings and judgment, and made new findings and a new judgment, conceding, as contended by the appellant, that the court had no power to do so, the appellant could not be prejudiced thereby, where it appears that the conclusion and judgment were the same upon both sets of findings. If the court had no such power, the order setting aside the first findings and judgment must be deemed void, and the first judgment must be deemed the only valid judgment, and it is sufficient, if the first findings support it, and are sustained by the evidence.

ID.—OMISSION IN TRANSCRIPT—DESCRIPTION OF NOTE—OBJECTION UPON APPEAL.—The omission of the printed transcript, by a clerical error, to show that the copy of the note sued upon, appended as an exhibit to the complaint, contained a promise to pay, or the name of the payee, though the certified record must be accepted as cor-

rect, cannot be objected to upon appeal for the first time, where no objection to the sufficiency of the note was interposed in the court below, either by demurrer or by objection to evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward A. Belcher, Judge.

The facts are stated in the opinion.

F. J. Castlehun, for Appellant.

Robert Ash, for Susan Krasky, Respondent.

F. H. Gould, for H. G. Krasky, Respondent.

COOPER, C.—This appeal is from the judgment and from certain orders afterwards made in regard thereto.

The action was brought to recover upon a promissory note for seven hundred dollars, dated November 1, 1897, due upon demand, with interest from date at the rate of one per cent per month, made by "H. G. Krasky," to plaintiff. It is alleged in the complaint that the defendants are, and were at the time of the execution of the note, copartners under the firm name of "H. G. Krasky," and that as copartners they made and delivered said note to the plaintiff.

The answer of defendant Wollpert denied that the defendants were ever copartners, and alleged that said Wollpert never at any time executed or delivered said note.

The principal issue made by the pleadings was as to whether or not the defendants were copartners, as alleged in the complaint. The court found: "That on the first day of November, 1897, and prior thereto, the defendants, H. G. Krasky and Charles Wollpert, were, and are, copartners in business at the city and county of San Francisco, state of California, under the firm name of H. G. Krasky; that as a member of the firm of H. G. Krasky and Charles Wollpert, copartners, the said H. G. Krasky made, executed, and delivered the promissory note set out in the complaint to the plaintiff in this action for a good and valuable consideration, and that no part of said note has been paid, except the sum of one hundred dollars on account thereof."

It is practically conceded that the note was made and delivered to plaintiff, and that it has not been paid, but it is earnestly contended that the evidence is insufficient to justify

the finding of the court that the defendants were copartners at the time the note was executed, or that they ever were such copartners. We have carefully examined the evidence and think it justifies the finding. It is only in rare and exceptional cases, where there is an entire absence of evidence, or where it is of such an unsubstantial character that it will not justify the conclusion reached, that we feel authorized to set aside the finding of the court below. In this case there is evidence which, if true, shows the defendants were copartners. Partnership is defined by our code as "the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." The defendant Krasky testified that on November 1, 1897, he and his co-defendant made an agreement to carry on business together and divide the profits; that the business was to be run by Krasky, under the firm name of "H. G. Krasky," and that he was to run the business and receive from the firm twelve dollars per week as wages; that he did so run the business, consulting, from time to time, with his co-defendant; that he employed men and fixed their compensation; that he borrowed \$1,775, and put it into the firm, which amount includes the amount for which the note in this case was given; that he borrowed \$900 from Mrs. Schriener, which was part of the \$1,775; and that he told his co-defendant that he had borrowed this money and put it into the business. When the note was presented to defendant Wollpert for payment, he told the witness Ash that the note was all right, and he paid one hundred dollars upon it and promised to pay the balance.

Defendant Wollpert, in his examination, admits that Krasky told him that he had borrowed money and put it into the business. He also admits that he paid one hundred dollars upon the note when presented to him by Ash. He also admits paying money to Mr. Bates for an account that Bates claimed "the store owed him for money advanced to Krasky"; that he also paid money to one Trull. The defendant Wollpert was asked, on cross-examination, if he did not pay Bates three hundred dollars by a check on the San Francisco National Bank, and he answered, "Yes, sir; I paid some money to Mr. Bates. Q. That was for the firm of H. G. Krasky, was n't it,—is n't that on the check?—A. I paid it for the firm,—for my store across the way."

The witness Bates testified that he loaned defendant

Krasky \$150 on his note, and when desired it paid, he went to see defendant Wollpert and told him that he looked to him (Wollpert) for payment; that he loaned the money to Krasky as one of the firm, and expected the note to be paid by Wollpert; that Wollpert said "that it was all right,—that it would be paid." That defendant Wollpert allowed the business to be run under the name of his co-defendant; that he paid similar bills; that he paid one hundred dollars on this note; that he paid Bates three hundred dollars "for the firm,"—are all circumstances corroborating the testimony of Krasky that a partnership existed between defendants.

It appears that on February 9, 1900, the court made and filed the findings herein quoted, and upon these findings judgment was entered February 13th. Appellant then gave notice that on February 23d he would make a motion for an order that the conclusions of law be made consistent with the findings of fact. Before this motion came on for hearing, and on February 21st, the court, of its own motion, made an order directing that the former findings be set aside and the judgment vacated, and thereupon filed new and different findings, and ordered judgment upon such new findings. Accordingly, on February 23d, when appellant's motion came on to be heard, the court denied it. It is now argued by appellant that after the court had once filed its findings, and judgment had been entered thereon, it lost jurisdiction as to the findings, and had no power, of its own motion, to set them aside. For the purposes of this case, we may concede such to be the law, and the result is, that the findings first filed, and herein quoted are the only findings in the case. If the court had no power to set them aside, the order, to the extent that it attempted to set them aside, is void. The conclusion of the court is the same upon each set of findings, and the judgment entered the same. It is therefore apparent that no injury was done appellant by setting aside the judgment and ordering the entry of another judgment. This brings us to a consideration of the question as to whether or not the findings first filed are sufficient to support the judgment, and we think they are.

The finding "that as a member of the firm of H. G. Krasky and Charles Wollpert, copartners, the said H. G. Krasky made the promissory note," is the equivalent of finding that the copartners made it. If Krasky made it as a member of the firm, he did not make it as an individual

only. If he, as a member of the firm, made it, the firm made it. Every general partner is an agent for the partnership in the transaction of its business. He may bind his copartners by an agreement in writing. The making of a promissory note by one member of the firm is not prohibited by statute. The finding is, that the note was made by one member of the firm, as a member thereof; that it was signed by the partnership name. The findings of the court should receive such construction as will uphold, rather than defeat, the judgment; and when, from the facts found by the court, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. (*Breeze v. Brooks*, 97 Cal. 77.) Any uncertainty in the findings is to be construed so as to support the judgment, rather than defeat it. (*Warren v. Hopkins*, 110 Cal. 506.)

The only criticism that can be made of the finding here is, that it is not a direct and positive finding that the note was executed by the firm of "H. G. Krasky." If the execution of the note by a member of the firm, as a member of the firm, and in the firm name, is not the equivalent of an execution by the firm, it is certainly very close to it. But whether or not the finding is, in effect, that the note was executed by the firm, we cannot see that appellant was in any way prejudiced by the failure to find the fact more directly. From the evidence in the record, from the judgment ordered, and from the attempted effort of the court to find more fully upon the issue, it is evident that if a more complete finding had been made it would have been adverse to appellant, and in such case the failure to find is not a ground for the reversal of the judgment. (*People v. Center*, 66 Cal. 564; *Murphy v. Bennett*, 68 Cal. 531; *Gillespie v. Lake*, 85 Cal. 407.) In this case, the appellant, by his notice, called the attention of the court to the fact that he did not think the findings of fact sufficient. The court attempted to correct the findings, and appellant now contends that it had no such power. It does not appear to us that a more full and complete finding could have in any way benefited the appellant.

It is finally claimed that the complaint fails to state a cause of action, because the copy of the note set forth in the printed transcript does not contain a promise to pay, nor the name of the payee. The omission was evidently a clerical error, but as the record purports to give a correct copy of the complaint, we must regard it as true. No de-

murrer was filed. The answer denies that defendants, as copartners or otherwise, made, executed, or delivered to the plaintiff the promissory note set out in the complaint, or any other promissory note, and alleges that the said note was executed and delivered to plaintiff without consideration. The issue was thus tendered by appellant. The case was tried upon the theory that such issue was made. No objection was made to the evidence offered. In such case the question cannot be raised here for the first time. (*Horton v. Dominguez*, 68 Cal. 643; *McDougald v. Hulet*, 132 Cal. 154.)

As the judgment entered on the twenty-first day of February, 1900, is herein treated as void, it is not necessary to further discuss it. Neither is it necessary to discuss the order entered March 1, 1900, refusing to set it aside. Both may be treated as void.

The judgment entered on the thirteenth day of February, 1900, being the only valid judgment, and the order of the court denying appellant's motion to make the conclusions of law conform to the facts entered February 23, 1900, should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment entered on the thirteenth day of February, 1900, being the only valid judgment, and the order of the court denying appellant's motion to make the conclusions of law conform to the facts entered February 23, 1900, are affirmed.

Temple, J., McFarland, J., Henshaw, J.

[S. F. No. 1849. Department Two.—October 11, 1901.]

JOHN MALONE, Respondent, v. GEORGE G. ROY, Appellant.

MORTGAGE—FORECLOSURE—TIME FOR REDEMPTION—CONSTITUTIONAL LAW.—The time for redemption from a sale under the foreclosure of a mortgage is that fixed by the statute in force at the date of the mortgage; and an extension of the time for such redemption, by a subsequent statute, cannot constitutionally apply to a sale under a mortgage executed prior to its passage.

ID.—DEED AND DEFEASANCE.—A warranty deed executed contemporaneously with a separate defeasance agreeing to reconvey the property deeded upon the payment of certain indebtedness therein described, constitutes a mortgage, which is within the rule determining the time for redemption from a sale under foreclosure thereof.

APPEAL from an order of the Superior Court of Del Norte County granting a writ of assistance to obtain possession of premises under a commissioner's deed upon sale of mortgaged premises. F. A. Cutler, Judge.

The facts are stated in the opinion.

N. A. Cornish, for Appellant.

Frank McGowan, and L. F. Cooper, for Respondent.

HAYNES, C.—In 1888 the defendant, being indebted to the plaintiff, executed to him a mortgage upon certain real estate to secure payment. In 1892 plaintiff brought an action to foreclose said mortgage, and on March 3, 1898, obtained a decree of foreclosure, under which the commissioner sold the mortgaged premises to the plaintiff on April 2, 1898, and no redemption having been effected, the commissioner executed a deed to the plaintiff therefor on October 21, 1898. Afterwards, upon plaintiff's motion, the court entered an order granting the plaintiff a writ of assistance to obtain possession of the premises sold, and from that order defendant appeals.

At the time the mortgage was executed, the statute gave the judgment debtor six months within which to redeem from a sale of real estate. By an act approved February 26, 1897 (Code Civ. Proc., sec. 702), the time within which the debtor might redeem was extended to twelve months;

and the only question is, Which statute governs? The court below rightly held that the statute in force at the time the mortgage was executed fixed the time within which the right of redemption must be exercised.

At the time this appeal was taken, the question here involved had not been expressly adjudicated in this state; but in the case of *Haynes v. Treadway*, 133 Cal. 400, the question is carefully considered, and this court, following *Barnitz v. Beverly*, 163 U. S. 119, directly held "that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." (See also *Savings Bank v. Barrett*, 126 Cal. 417.) It is quite sufficient to cite the above cases, without repeating the arguments upon which the conclusions in those cases were reached.

Appellant, however, referring to the case of *Barnitz v. Beverly*, 163 U. S. 119, suggests whether the present case is not distinguishable from that, upon the ground that instead of executing a mortgage, properly so called, the transaction consisted of the execution of a "warranty deed" by the defendant to the plaintiff of the premises therein described, and the execution of a defeasance by the plaintiff, by which he agreed to reconvey the same to the defendant upon the payment of the indebtedness therein described.

It is well settled in this state that such a transaction constitutes a mortgage; and besides, it has been directly adjudicated between these parties that the so-called deed was not a conveyance, but a mortgage. (See *Malone v. Roy*, 94 Cal. 341, and *Malone v. Roy*, 107 Cal. 518.)

The order granting the writ of assistance should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order granting the writ of assistance is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 843. Department Two.—October 11, 1901.]

CHARLES S. HOWARD, Respondent, v. ELEANOR B.
HOWARD, Appellant.

DIVORCE—DESERTION—PLEADING—FINDINGS—ULTIMATE AND PROBATIVE FACTS—AGREEMENT FOR SEPARATION—REFUSAL OF RECONCILIATION.—In an action for divorce on the ground of desertion, the alleged willful desertion of the plaintiff by the defendant is not a conclusion of law, but is the ultimate fact to be pleaded and found; and where there has been a separation of the parties by agreement, an offer of reconciliation, made in good faith by the plaintiff, and the refusal thereof by the defendant, are probative facts, tending to prove desertion, and need not be pleaded and found.

ID.—FORMER CRUELTY OF HUSBAND—IMMATERIAL EVIDENCE.—Evidence of the former cruelty of the husband in striking the wife, two years prior to the agreement for separation, and seven years prior to the husband's offer of reconciliation and her refusal thereof, is too remote, and is immaterial to the issue of desertion on her part, alleged as of the date of such offer and refusal.

ID.—FORMER JUDGMENT.—The record of a former judgment in an action for a divorce, brought by the husband on the ground of an alleged desertion by the wife, as of a date subsequent to the agreement for separation, and prior to the offer of reconciliation, in which action the husband was defeated, is irrelevant and immaterial to the issue of desertion alleged as of the subsequent date of the offer and refusal.

ID.—GOOD FAITH OF OFFER—CONFLICTING EVIDENCE—SUPPORT OF FINDING.—Where the court found, upon conflicting evidence, that the offer of the husband, which the wife refused, was made in good faith, and where, on the face of the testimony, there is enough evidence of good faith to justify the finding, it will not be disturbed upon appeal.

ID.—SUBSEQUENT OFFER AFTER SUIT BROUGHT—REFUSAL—MATURITY OF ACTION.—A subsequent offer of reconciliation, made by the plaintiff after suit brought, which was refused, cannot defeat or render premature an action for divorce which was based upon an alleged desertion as of the date of a prior offer and refusal.

ID.—EFFECT OF ACCEPTANCE.—An acceptance of subsequent offers within one year after the date of the prior offer and refusal would have defeated the action; but an acceptance after the expiration of the year could not defeat it.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. D. K. Trask, Judge.

The facts are stated in the opinion.

Porter & Sutton, for Appellant.

C. C. McComas, and F. R. Willis, for Respondent.

CHIPMAN, C.—Divorce on the ground of desertion. Plaintiff had judgment, from which and from the order denying motion for a new trial defendant appeals. Finding 3 was as follows: "That on the tenth day of March, 1897, the defendant willfully and without cause deserted and abandoned the plaintiff, and ever since has deserted plaintiff, and continues to live apart from him without his consent." Finding 7 was, that "on or about the twentieth day of March, 1893, the plaintiff and defendant entered into an agreement of separation, set forth in paragraph 7 of defendant's answer." The agreement is in writing, signed by the parties, and states that in consequence of unhappy differences they have agreed, and do agree, to live separate and apart during the remainder of their lives. Provision is made for the payment of a certain annuity by plaintiff to his wife; also, disposition is made of certain real property, and some other provisions, not necessary to be stated, are embraced in the agreement.

1. Appellant claims that finding 3 is not supported by the evidence, and is in reality a conclusion of law, and that there are no findings of fact to support it as such. There was no finding that plaintiff, in good faith, sought a reconciliation and restoration of marital rights under section 101 of the Civil Code, or that defendant ever refused such reconciliation, and it is claimed that in the absence of a finding on one or other of these facts, finding 3 cannot stand as a conclusion of law.

Section 101 of the Civil Code is as follows: "Consent to a separation is a revocable act, and if one of the parties afterward, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion." So long as the parties were living apart by agreement, there was no desertion. When, however, a reconciliation and restoration were, in good faith, sought by plaintiff and refused by defendant, such refusal became desertion. It was not necessary to allege such offer, nor was it necessary to find such fact. The ultimate fact alleged and found was willful desertion. The fact that plaintiff had sought reconciliation was a probative fact, tending to prove the desertion. Finding 3 is not a conclusion of law, but is a finding of the ultimate fact alleged in the complaint.

2. The answer alleged, that, prior to the agreement to sep-

arate, plaintiff treated defendant in a cruel and inhuman manner, and alleged specific acts of cruelty, and that in consequence thereof she was obliged to seek the care and shelter of friends, and since that time has not lived with plaintiff; that on March 18, 1893, she began suit for a divorce against her husband on the ground of extreme cruelty, and the answer refers to the records of the court, making them part of her answer; that thereafter—to wit, on March 20, 1893, two days after her complaint was filed,—the agreement above referred to was executed by the parties. Her action for divorce seems to have been abandoned, so far as appears. It is further alleged, that about the ninth day of March, 1897, the plaintiff herein began an action for divorce against defendant on the ground of desertion; that said suit came on for trial, March 18, 1898, and thereafter judgment was duly given and made for defendant, “denying the application of the plaintiff herein for a divorce and adjudging that he take nothing by his action.” The present action was commenced March 20, 1899. Defendant was asked, as a witness in her own behalf, to state whether or not her husband struck her in the month of June, 1891. The question was objected to as immaterial, and not within the issues, and too remote. Defendant urged then, and now urges, that the question was intended to draw out facts which would bear on plaintiff’s good faith in seeking reconciliation in 1898. We think the ruling was correct. Defendant also offered to introduce the record in the former divorce case brought by plaintiff. It was objected to as irrelevant and immaterial, and was, we think, rightly excluded. In making the offer defendant did not state its purpose, or what connection it had with the present case, and we cannot see that it was relevant for any purpose.

3. It is contended that the evidence showed that plaintiff’s effort to bring about a reconciliation was not sincere, or made in good faith. Several witnesses were called upon this point. At most, the evidence is conflicting. On the face of the testimony, there is enough to justify the court in its conclusion that plaintiff was acting in good faith. If there was anything in the manner of plaintiff, or of his other witnesses, which would show that he was merely preparing the way to bring this action, and was not sincerely seeking a reconciliation, the trial court could better judge the fact than we can here. We cannot say the court erred in its conclusion. The fact

that plaintiff took witnesses with him when he went to make his offer is urged as a strong circumstance showing lack of good faith. Due weight was doubtless given to it by the trial court.

It appears from the testimony of Mrs. Howard that the court interrogated her to considerable extent, obviously to ascertain her feelings towards her husband, and why she had refused to accept his offer of reconciliation. It is manifest from her answers that she was unwilling to consider the offer, unless her husband would first express contrition for his past treatment of her, many years before, and unless he would confess that he had wronged her and would seek forgiveness. It is quite clear that the past was still vivid and rankling in her mind, and that she could have no faith in her husband's present sincerity, unless he would in some way atone for prior delinquencies. Upon a careful examination of all the evidence, we think there was sufficient to warrant the court in concluding that plaintiff was acting in good faith in seeking reconciliation, and that defendant refused then, and ever since has refused, to accept his offer. His first interview with her was on March 19, 1898, and his complaint, as above stated, was filed March 20, 1899.

Plaintiff renewed his solicitations, March 22, 1898, with like result, and it is claimed that the statute began to run from this latter date, and not from March 19th, and that therefore the action was prematurely brought. If defendant had accepted any of the subsequent offers in good faith, and had consented to return to her husband within one year from the first offer of reconciliation, it would have defeated the action (*Benkert v. Benkert*, 32 Cal. 451); but not so if the acceptance was after the right of action had fully accrued. (*Id.*) But the evidence shows no change of mind in defendant from the time the first offer was made, and even at the trial her testimony showed an unwillingness to again live with her husband, unless he would in some way prove his sincerity to her satisfaction, and would seek her forgiveness for the past.

It is advised that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 827. Department Two.—October 11, 1901.]

CRANES GULCH MINING COMPANY, Respondent, v.
JOSEPH SCHIERRER et al., Appellants.

MINERAL LANDS—PLACER CLAIM—CERTIFICATE OF PURCHASE—UNAUTHORIZED RESERVATION IN PATENT—KNOWN LODES.—A certificate of purchase of a placer-mining claim, issued under the Placer Act of July 9, 1870, prior to the passage of the General Mining Act of May 10, 1872, conferred upon the purchaser an equitable title, and vested right to a patent, which was not subject to section 11 of the latter act; and a reservation, made in a patent for such claim issued after May 10, 1872, of all known lodes within the limits of the placer claim, was unauthorized and void.

ID.—TITLE TO MINERALS—SUBSEQUENT LOCATION OF LODE CLAIM.—In the absence of a prior location of a known lode within the limits of the placer claim, and a contest thereupon in the land-office, the patent granted under the certificate of purchase issued prior to the act of 1872 conferred upon the purchaser the title to all minerals within such limits; and a subsequent location, made by another person, of a lode previously known to exist therein, is invalid and void.

APPEAL from a judgment of the Superior Court of El Dorado County. N. P. Bennett, Judge.

The facts are stated in the opinion of the court.

Tabor & Tabor, and John M. Fulweiler, for Appellants.

There was a known vein or lode within the limits of the placer claim, within the meaning of the act of Congress, which was reserved from the operation of the patent. (*Iron Silver M. Co. v. Cheesman*, 116 U. S. 529; *Reynolds v. Iron Silver M. Co.*, 116 U. S. 787; *Stevens v. Williams*, 1 McCrary, 480; *Foote v. National Mining Co.*, 2 Mont. 402; *Hyman v. Wheeler*, 29 Fed. Rep. 353; *Phillpots v. Blasdel*, 8 Nev. 62; *Iron Silver M. Co. v. Mike and Starr G. & M. Co.*, 143 U. S. 394.)

Lindley & Eickhoff, and Williams & Witmer, for Respondent.

The land department, prior to the act of 1872, adjudicated the character of the land as placer-ground, under the act of 1870, and the court cannot review its adjudication. (*Barden v. Northern Pac. R. R. Co.*, 154 U. S. 288, 331; *United States*

v. Budd, 144 U. S. 154, 167; *Shaw v. Kellogg*, 170 U. S. 312; *Cowell v. Lammers*, 10 Saw. 246, 255; *Gale v. Best*, 78 Cal. 235, 237;¹ *Klauber v. Higgins*, 117 Cal. 451, 458.) The certificate of purchase, prior to May 10, 1872, conferred a vested right to a patent. (*Benson Mining etc. Co. v. Alta M. etc. Co.*, 145 U. S. 428, 430-432; *Con. Wyoming G. M. Co. v. Champion M. Co.*, 63 Fed. Rep. 540, 541; *Walrath v. Champion M. Co.*, 63 Fed. Rep. 552, 553.) The land department are the agents of the government, and cannot insert reservations or recitals not warranted by law. (*Cowell v. Lammers*, 10 Saw. 246, 248; *Davis v. Weibbold*, 139 U. S. 507, 527; *Iron Silver M. Co. v. Reynolds*, 124 U. S. 374, 382; *United States v. Iron Silver M. Co.*, 128 U. S. 673, 682.) There was no known vein or lode, within the meaning of the statute. (*Iron Silver M. Co. v. Mike and Starr G. & M. Co.*, 143 U. S. 394, 404.)

TEMPLE, J.—Action to quiet title to mining-ground. Plaintiff claims under a patent for a placer mine, dated July 1, 1872. The defendants claim under a lode location made in 1897. Plaintiff's patent was based upon proceedings instituted May 9, 1871, and upon final entry and payment made February 14, 1872.

The rights of plaintiff had their inception under what is usually called the "Placer Act," dated July 9, 1870. This act, though not repealed, was amended by adding a reservation of known lodes, and in some other respects, by the act of May 10, 1872, sometimes called the "General Mining Act." In section 10 it was enacted that the Placer Act should continue in force, except as to the proceedings to obtain a patent, which, it was provided, "shall be similar to the proceedings prescribed by sections 6 and 7 of this act for obtaining patents to vein or lode claims." It was further enacted in the same section, that all placer claims thereafter located should conform to legal subdivisions of public-land surveys, "provided, that proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases."

Defendants claimed under a location made of a lode some twenty-six years after the issuance of the patent. It is contended that the lode was a known lode when the application

for the patent was made in 1871. The patent contained the usual reservation found in all patents issued under the act of 1872, of veins or lodes known to exist at its date, within the described premises. Defendants had no claim to the premises at the date of the passage of the act of 1872, or prior to 1897. It does not appear that there was any adverse claim to the placer location prior to that time.

Sections 6 and 7 contain rather elaborate provisions in regard to the application for a patent and for a contest. Section 11 provides for the case where a placer claim contains a lode within its boundaries. The placer claimant may purchase the lode if he chooses, but if a lode is known to exist within the placer, "an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right to the vein or lode claim, but when the existence of a vein or a lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The first question of interest here is, Does section 11 apply to plaintiff's location? and does it authorize the reservation contained in the patent? It may be conceded that where no application for a patent had been made by a placer claimant, whose location and occupation were such that he could have inaugurated proceedings for a patent before the act of 1872 was passed, he would be compelled to proceed under section 11, and that the act made his patent subject to the conditions there expressed. Possibly, this would be true as to applications pending when the last act was passed, provided payment had not been made and a certificate issued, but to make it apply to a claim, when a certificate of purchase has been issue before the act of 1872 was passed, so as to include these reservations, would violate the provisions in section 16 of the act, "that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

Upon payment of the price, and its acceptance, the applicant becomes vested with a complete equitable title, and to a patent which will convey to him the legal title. He is the real owner of the mine. His right is complete; only the evidence of his right is withheld. It has been held, "When

the price is paid, the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the office causes delay. But such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast additional burdens upon the purchaser, or expose him to the assaults of third parties." (*Benson Mining etc. Co. v. Alta Mining etc. Co.*, 145 U. S. 431. See also *Stark v. Starrs*, 6 Wall. 402, and *People v. Shearer*, 30 Cal. 645.)

One of the contentions of appellants upon this point, if I rightly grasp it, is, that lodes did not pass by a patent issued for a placer claim under the act of 1870. This is based largely upon the language of section 12, as numbered in the amendatory act: "Claims usually called 'placers,' including all forms of deposits, *excepting veins* of quartz and other rock in place, shall be subject to patent and entry under this act," etc.; and it is contended that it is to be construed as other sections of the act of which it is made a part had been construed. The act, it is contended, authorizes the sale to a lode claimant of one lode only. He gets no land, save such as is required for the convenient working of his lode. If another lode or a placer were found within land taken by a lode claimant under the act of 1866, of which the act of 1870 was amendatory, the lode claimant would have no right to the other lode, or to the placer. So here, it is said, the act of 1870 only authorized the sale of a placer claim. Without entering the land or getting a patent, the claimant could hold and work out his mine, but to hold it he was required to comply with certain burdensome conditions. The patent, it is argued, merely gave him title to his claim, and relieved him from the burdensome conditions. He then owned his claim, freed from the conditions and the liability to lose it by abandonment. But what he *claimed* was the right to mine that placer, and, in terms, the statute confines his patent to that. And this position is much strengthened by the rule of construction which requires all grants from the government to be construed favorably to the government and against the grantee.

Furthermore, it is said the same act provides for the purchase of a lode claim, and land necessary for its working, at the price of five dollars per acre, and it is provided that "no patent issue for more than one vein or lode, which shall be expressed in the patent issued." It is strongly urged that

Congress could not have intended, while so carefully providing that no one person should be permitted to purchase more than one lode, to permit, in another section of the same statute, any one to purchase a tract of land, which may include many lodes, at one half the price per acre charged for lode claims.

All this is very plausible and persuasive, but the statute clearly authorizes the sale of placer-lands in tracts not to exceed 160 acres, and that such tract shall conform to the system of public surveys. No provision is made for any reserved right in the government, or for the disposition of the land subject to the rights of the placer claimant. The lode claimant gets a complete title to the lands within his patent, subject only to the express reservation, which the law directs should be contained in the patent. No reason appears why a placer patent shall not be construed in the same way, and the law has not expressed any limitation upon the estate, or authorized the officers of the land department to express in the patent any reservation. In the absence of a located lode within the limits of the placer claim, and of a contest, it would seem that the officers of the land department need only ascertain that there is a placer which may be entered as such.

The law of 1872 supplied an apparent defect in the law of 1866, as amended in 1870, by providing for a reservation of known lodes. This is calculated to protect the government, and to prevent the entry of lodes as placer, and thereby get lode claims for \$2.50 per acre.

The argument merely tends to show that the rights of the government were not sufficiently protected by the law of 1870, and the further provision made in 1872, in that matter, seems to show that, in the opinion of Congress, without the express reservation full title to the land would pass under the patent.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 1962. Department Two.—October 11, 1901.]

JACOB STEEN, Appellant, v. SANTA CLARA VALLEY
MILL AND LUMBER COMPANY, Respondent.

**EVIDENCE—IMPEACHMENT OF WITNESS—PARTICULAR WRONGFUL ACTS—
CROSS-EXAMINATION—COLLATERAL STATEMENTS CONCLUSIVE.**—A
witness cannot be impeached by evidence of particular wrongful
acts; and his collateral statements, elicited on cross-examination,
relative to such acts, and to his declarations concerning the same,
not included in his examination in chief, and wholly outside of the
issues, are conclusive, and cannot be contradicted by other wit-
nesses.

APPEAL from a judgment of the Superior Court of Santa
Cruz County and from an order denying a new trial. Lucas
F. Smith, Judge.

The facts are stated in the opinion.

Z. N. Goldsby, and Charles B. Younger, for Appellant.

D. W. Burchard, and Carl E. Lindsay, for Respondent.

GRAY, C.—Action for damages arising from the destruc-
tion of plaintiff's cord-wood, fence-posts, etc., by fire com-
municated from defendant's locomotive. The defendant
obtained a verdict and judgment in its favor, and the plain-
tiff appeals from an order denying his motion for a new
trial.

The respondent files no brief.

Plaintiff's most important witness, both as to the extent
of the damage suffered and as to the origin of the fire, was
his foreman, named Augustus Keyser. The defendant, in
the cross-examination of this witness, went into matters al-
together outside of the issues on trial. He was asked where
he got the money to pay for some land that he had pre-
empted in Humboldt County, and if he did not borrow it,
and then an inquiry was made, as follows: "Did you not
tell Mr. Cody, in December, 1893, near the old W. Whittle
mill, on the public road beyond Dougherty's mill, that you
got \$250 to prove up some land for a man, and that you
skipped out and left the man in the lurch, and that you sold
the land and pocketed the money?"

The court permitted this and several other similar ques-
tions concerning the same matter to go in, against the ob-

jection and exception of plaintiff, taken on the ground that this was not cross-examination and was immaterial. The witness answered these questions in the negative mainly, but stated that he did not know where he got the money to pay for the land. This witness was also asked, on cross-examination, as follows: "Did n't you tell Mr. Dougherty that you wanted to ship some of plaintiff's wood in Dougherty's name so that plaintiff would not find it out, so that you could get the money that was due you, and that was the only way you could get money out of Steen?" The witness denied this statement also. Again, the witness was asked if he did not tell Cody that he (witness) had stood in with the choppers, and when they cut ten, fifteen, or twenty cords of wood he would report fifteen, twenty, or thirty cords to Steen, and divide with the choppers? The witness, against the objection and exception of appellant, was compelled to answer, and he denied the conversation. Thereafter, Dougherty was called as a witness, and against the objection of appellant that it was irrelevant, "relates to collateral matter, and involves a question of wrongful acts of the witness Keyser toward the plaintiff," he testified, in substance, that Keyser, in April or May, 1896,—nearly a year after the fire complained of,—asked him (Dougherty) to allow Keyser to ship wood in Dougherty's name and pay Keyser the money for it, "so that Steen (his employer) would not know it." Cody was also called as a witness by respondent, and testified that he had a conversation with Keyser in May, 1894, in which Keyser said, "When the choppers cut ten or fifteen cords of wood, I report the amount to Steen at twenty-five or thirty cords, and divide the profits with the choppers," and that Keyser turned around and pointed to where a clump of oaks had formerly stood, and said, "Those trees made me eight or ten cords of wood, and I turned them into Steen for twenty-five cords, and I and the choppers divided." This was also duly objected to, and exception taken to the action of the court in admitting it. It is obvious that all this must have seriously affected the credibility of the witness Keyser in the eyes of the jury. It is equally obvious that the rulings of the court in connection with the matter were in plain violation of section 2051 of the Code of Civil Procedure, which forbids the impeachment of a witness "by evidence of particular wrongful acts." It cannot be said that any of the alleged statements of the witness, concern-

ing which inquiry was made, was "inconsistent with his present testimony," within the meaning of section 2052 of the Code of Civil Procedure. The statements of the witness must be pertinent to the issues on trial, or they cannot be contradicted. The questions at issue were the origin of the fires of July 25 and 26, 1894, and the amount of wood and other property destroyed at that time. The statements put in evidence had no connection with these questions, nor were they contradictory of anything that the witness had testified to in his examination in chief, and therefore the questions concerning them should have been excluded. (*Faulkner v. Rondoni*, 104 Cal. 140.)

For the foregoing reasons we advise that the order appealed from be reversed.

Smith, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1981. Department Two.—October 11, 1901.]

BENJAMIN F. SHEYER, by A. W. LINFORTH, his
Guardian ad Litem, Respondent, v. N. R. LOWELL et
al., Appellants.

NEGLIGENCE—INJURY IN ELEVATOR-SHAFT—GUIDANCE BY SERVANT—ABSENCE OF WARNING.—Where the plaintiff, being a stranger to defendant's warehouse, was sent there to sample goods, he was justified in trusting himself to the guidance of defendant's porter, and where such porter led him through a dark passage to a poorly lighted and unguarded elevator-shaft, into which he fell, under circumstances which warranted the jury in finding that the negligence of the porter in failing to warn the plaintiff, and not the contributory negligence of the plaintiff, was the proximate cause of the injury, a verdict against the defendant, who was the employer of the porter, is sufficiently sustained.

ID.—CONTRIBUTORY NEGLIGENCE—ESTOPPEL OF DEFENDANT.—The defendant cannot be heard to urge that the plaintiff, having been led by defendant's servant to such unprotected elevator-shaft, without warning of danger, walked into the shaft as the result of his own negligence.

Id.—DUTY TO PROTECT SHAFT—CONSTRUCTION OF CITY ORDINANCE—EVIDENCE.—A city ordinance providing that “every opening in a shaft or hoist-well within two and a half feet above the floor shall be protected by a rail, gate, door, or drop-door,” is not invalid as being class legislation, but applies for the protection of all classes of people, and to every opening in a shaft or hoist-well in houses erected before as well as after its passage. Such ordinance was admissible in evidence to show the duty of the defendant to protect the shaft in which the plaintiff was injured.

Id.—TWO THEORIES OF NEGLIGENCE—REFUSAL OF REQUESTED INSTRUCTIONS.—Where the evidence tended to support two theories of negligence, one being the absence of any guard to the well, and the other the porter’s act in leading plaintiff to the well and permitting him to fall into it, requested instructions for the defendant, based upon one of these theories alone, and ignoring the other, were properly refused.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Cary Howard, for Appellants.

Pierson & Mitchell, for Respondent.

GRAY, C.—This action was brought to recover damages for personal injuries, alleged to have been sustained by plaintiff in falling down an elevator-well, negligently left open in defendants’ warehouse, situated in the city of San Francisco. The plaintiff had a verdict and judgment for three hundred dollars. Defendants appeal from an order denying their motion for a new trial.

The plaintiff was sent by his employer to the warehouse of defendants to procure a sample of nuts stored there. On entering the warehouse, he was informed by the porter in defendants’ employ that he thought the goods were on the floor above. The porter said, “We will take the elevator and go up.” The porter then led the way down a dark and narrow passage, some fifty feet from the front door to the elevator in the back part of the building, where he seized the rope of the elevator, and the plaintiff, thinking the elevator was about to start up, attempted to go upon it, but, it being at the next floor above, he stepped into the well and fell to the cement floor of the basement, severely injuring his knee. It was a rainy, gloomy day, and so dark

where the elevator was supposed to be, that plaintiff could not see whether it was there or not, but it appears that the porter knew, on approaching the well, that the elevator was at the floor above, and really took hold of the rope to bring it down when plaintiff fell. Though the well was without any guard rail or chain in place, the porter appears to have taken no steps to warn plaintiff, or prevent him in any way from falling into it. Of course, the plaintiff had the right to trust himself to the guidance of the porter. He also had the right to suppose that the porter would not drop him through any trap-door, or guide him into any elevator-well; and we think the jury were warranted in reaching the conclusion that the injury was the proximate result of the negligence of the porter, and not the result of any contributory negligence on the part of the plaintiff. Finding this well open, poorly lighted, and unguarded, as he did, common prudence demanded of the porter that he should see to it that a stranger on the premises did not walk or fall into it; and his employer should not, under the circumstances disclosed, be heard to say that the stranger walked into it himself as the result of his own negligence. Clearly, the porter was negligent, and we need go no further in search of evidence to uphold the verdict against his employers.

That the damages found are not excessive, is also clear. The defendant was laid up with a badly injured knee, and under the constant care of physicians, for two months, and at the time of the trial—nearly a year later—he had not entirely recovered. The evidence would have supported a verdict for damages greater than three hundred dollars.

The plaintiff put in evidence an ordinance of the city of San Francisco, requiring that "every opening in a shaft or hoist-well within two and a half feet above the floor shall be protected by a rail, gate, door, or drop-door." The objection urged to this ordinance is, first, that it was intended only to protect firemen, policemen, etc., and was never intended to protect the class of people to which this plaintiff belongs. The law, not being restricted to any class of people by its terms, will not be construed into a condition that might make it objectionable to the constitutional provisions against class legislation. We think the ordinance was intended for the benefit and protection of any person who might suffer by reason of its provisions having been violated, and this objection to it is therefore not well taken.

The second objection urged to the ordinance is, that it applies only to houses erected after its passage. It does not say so, but, on the contrary, is general in its terms, and requires "*every* opening in a shaft," etc., to be protected as therein provided.

The instructions given, when read together, are free from error, and there was no error in the refusal of offered instructions. Nor was the verdict contrary to the law as laid down in the instructions. It would illustrate nothing new or instructive to quote these instructions, or to attempt to analyze the law in connection therewith.

It is thought sufficient to say, under this head, that there were two theories upon which the plaintiff might well complain that defendants were negligent—the one being predicated upon the absence of any bar or other guard to the well, the other upon the porter's act in leading plaintiff to the well and negligently permitting him to fall into it. The three instructions as to which appellant now claims the court erred in refusing were each and all properly refused, because they ignored this last-named theory of negligence, the jury being told, in substance, in each of them, that if the first-named theory was negatived by the evidence, the verdict should be for defendants.

The order appealed from should be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 910. Department One.—October 12, 1901.]

JAMES A. BLOOD, Respondent, v. LA SERENA LAND
AND WATER COMPANY, Appellant.

FINDINGS—DECISION BY DIFFERENT JUDGE—STIPULATION—REVIEW UPON APPEAL—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.—A judge, other than the trial judge, who passes upon the evidence stands in the shoes of the trial judge; and the fact that the judge who, by stipulation of the parties, decided the cause and made the findings was not the one before whom the witnesses appeared at the trial cannot change the presumptions, upon appeal, in favor of the decision of the trial court, nor affect the rule that this court will not disturb a finding, if the evidence relating thereto is substantially conflicting, nor unless there is either an entire absence of evidence to support it, or so slight evidence as to show an abuse of discretion.

MORTGAGE OF CORPORATION—FORECLOSURE—ABSENCE OF RESOLUTION OF AUTHORITY—ESTOPPEL.—A corporation defendant, against whom a mortgage is sought to be foreclosed, is estopped to deny its validity, notwithstanding the absence of a proper resolution of authority therefor, where it is made to appear that the plaintiff conveyed land thereto, and took the mortgage in part payment thereof, believing that the corporation had legally executed it, and that the latter retained the possession and benefits of the land and sold part thereof, and recognized its indebtedness therefor, which was acquiesced in, and not disputed by the directors or any stockholders until the mortgage was foreclosed, five years after the purchase.

ID.—AGENCY—EMPLOYMENT OF BROKER BY PLAINTIFF—SUBSCRIPTIONS TO STOCK—GOOD FAITH—TRUST—ESTOPPEL NOT AFFECTED.—The employment, by the plaintiff, of a real estate broker to negotiate a sale of the land, before its conveyance to the corporation, which employment was known to the directors and promoters of the corporation, but was unknown to some of the stockholders thereof, and a subscription by such broker to the stock of the corporation, and his becoming secretary thereof, do not show him to be a trustee of the corporation, nor affect the estoppel of the corporation to deny its mortgage to the plaintiff, where it appears that all of the subscriptions to stock were in good faith; that the plaintiff was not a director, promoter, or trustee of the corporation, and that none of the stockholders were deceived or misled by any misrepresentations or concealment by plaintiff or his agent, nor by any of the subscriptions to the stock.

APPEAL from a judgment of the Superior Court of Santa Barbara County and from an order denying a new trial. W. S. Day, Judge.

The facts are stated in the opinion, and in the decision of the court upon the former appeal, reported in 113 Cal. 221-238.

Thomas McNulta, and J. S. Chapman, for Appellant.

R. B. Canfield, and J. W. Taggart, for Respondent.

CHIPMAN, C.—Foreclosure of mortgage, and plaintiff had judgment. The action was dismissed as to all the defendants except the land and water company, and it appeals from the judgment and from the order denying its motion for new trial. The case was here once before, and it was then held that the note and mortgage were not originally the act of the corporation. On the remaining issue of ratification, it was held that the subsequent conduct of defendant did not constitute ratification, within the meaning of that term as used in the Civil Code, and that if such conduct had any effect, it was by way of estoppel. (*Blood v. La Serena L. & W. Co.*, 113 Cal. 221.) Referring to the situation of the pleadings, the court said: "He (plaintiff) successfully makes out a *prima facie* case, and may, without pleading it, use the evidence in estoppel to prevent the corporation from maintaining what, as against its acts, would be an unjust and unwarranted defense." There being no findings on the question of estoppel, a new trial was ordered, the court saying: "Upon such trial, it may be determined what position Blood, Jr., occupied in relation to the corporation—whether he was merely a mouthpiece to deliver messages, or whether he was chargeable with the high good faith exacted of all who stand in a relation of trust. It may also be determined whether or not the corporation knew, or was chargeable with knowledge, of the interest of Blood, Jr., and of the fact that he was to receive a commission from the vendor. In short, there may be explicitly set forth the acts and conduct of the corporation which may be claimed to estop it from contesting the validity of the note and mortgage. Thereafter, should an appeal be taken to this court, the question will be properly under review." An amended answer alleged facts bearing upon the points suggested above by this court, and some others, on which and on the issue of the estoppel the trial court found adversely to defendant. These matters of defense, and the facts bearing on the issue of estoppel, will be understood from the findings. For a general history of the case, reference is made to the opinion in the former ap-

peal. The cause was retried on the evidence taken at the first trial, and on some additional evidence submitted by the respective parties. The court found the following facts: That, prior to the formation of the corporation, plaintiff authorized his nephew, Blood, Jr., who was then a real estate agent or broker, to negotiate a sale of the lands for one hundred and five thousand dollars, on certain terms, and it was agreed between them that the latter should be paid by the former a commission of five thousand dollars for his services as agent or broker in the event of his effecting such sale; that Blood, Jr., proceeded to negotiate with certain persons for the sale to them of said land, and, for the purpose of effecting the purchase, the said persons organized the defendant corporation and became subscribers to its stock, and proposed to plaintiff, through Blood, Jr., to purchase on certain terms (somewhat modifying plaintiff's original terms), which proposal plaintiff accepted; that at the time of the formation of the corporation, and prior to the conveyance to it of said land, both plaintiff and Blood, Jr., became subscribers to the stock of the corporation with knowledge of the other subscribers; that there was no agreement between plaintiff and Blood, Jr., relating to said sale, other than as above stated, and that no agreement between them was secret, or concealed from the subscribers to said stock, or from any of them, or from the corporation, and that Blood, Jr., made no representations as to the terms of the sale or as to his relations to the corporation or its corporators or stockholders, otherwise than in accordance with the facts above stated; that he was not authorized to act, and did not act, as agent of the subscribers, or on behalf of said corporation, in connection with the sale, otherwise than in communicating to plaintiff the aforesaid modification of the terms of sale, and in receiving plaintiff's assent thereto, and in the payment over to plaintiff of a portion of the purchase-money for said land agreed to be paid by said subscribers; that none of the subscribers to the stock were pretended purchasers thereof, or were otherwise than *bona fide* subscribers in their own right, and none of said subscribers became such under any agreement that their shares, or the shares of any of them, were to be transferred to plaintiff, or that they, or any of them, were to be held harmless by plaintiff on account of any payments made by them for said stock; that none of the subscribers were deceived or misled by the subscriptions of any other sub-

scribers, or by any representations of plaintiff or Blood, Jr.; that neither plaintiff nor said Blood, Jr., represented said ranch to be worth one hundred and five thousand dollars, or any other sum; that at the time of the purchase there was payable from the subscribers to stock one half the par value thereof by them subscribed, respectively, to be applied to the cash payment on the land, which they directed to be paid to plaintiff; that the amount payable on the five thousand dollars subscribed by Blood, Jr., was paid, with the commission payable from plaintiff to him for effecting the sale as aforesaid; that the corporation at all times had notice of the agency of Blood, Jr., as the agent of plaintiff for the sale of said land, and of the terms on which said sale was authorized by plaintiff, and of the commission to be paid his said agent.

Finding 10 is as follows: "That from the time of the execution and delivery of the deed of plaintiff to the defendant corporation, as aforesaid, the said corporation has held the title to the lands thereby conveyed to it, except in so far as it has divested itself of title to the portions of said lands sold by it; that immediately upon receiving the conveyance aforesaid, the said corporation entered into possession of the lands and premises so conveyed, caused the said land to be surveyed and subdivided into blocks and lots for convenience of sale, and proceeded to develop a spring on said land by running a tunnel under it. In the month of September, 1888, the said corporation sold and conveyed to plaintiff a parcel of said land, comprising $8\frac{1}{4}$ acres, for the price of \$3,750. In February, 1890, another parcel of said land was sold and conveyed by said corporation to Emily F. Thompson. That the said lands, while in the possession of said corporation, were managed and cultivated by and under the direction of said corporation, and by its tenant, to whom a portion of said land was leased by said corporation, and the rents and proceeds thereof were received by said corporation and applied to its own use, and that a portion of the fruit trees growing on said land at the time of the sale by plaintiff were cut down and removed therefrom by the defendant corporation, and the land formerly occupied by them used by the corporation for other purposes; that, from time to time, after the execution and delivery of the note and mortgage as aforesaid, the said corporation made payments to plaintiff on account of the interest and principal of said note; that the defendant cor-

poration continued in the possession of said land, excepting the portions thereof sold as aforesaid to plaintiff and to Emily F. Thompson, until the month of October, 1889, when the possession of the unsold portion of said lands was delivered by said corporation to plaintiff under an agreement between said corporation and plaintiff that the plaintiff should accept the rents, issues, and profits of said lands in satisfaction of the interest to accrue on said note, and that plaintiff has ever since continued in the possession of the lands so delivered to him under said agreement, and that the defendant, La Serena Land and Water Company, is estopped from denying the due execution and delivery of said note and mortgage."

The court also found, that on May 26, 1892, defendant passed a resolution to reconvey all the unsold land, in pursuance of which a deed was executed in due form by defendant, but said deed has not been delivered to plaintiff; that defendant is willing to deliver the same upon receiving from him the amounts actually received from the persons described in the amended answer as the *bona fide* purchaser of the stock of said corporation.

The elaborate review of the evidence in the briefs of counsel for appellant seems to be presented on the theory, and indeed defendant contends, that this court may examine the evidence and determine the controversy uncontrolled by the rule as to conflict, and regardless of the usual presumptions in favor of the decision, for the reason that the judge who, by stipulation of the parties, decided the case and made findings was not the judge before whom the witnesses appeared.

It was held in *Churchill v. Flourney*, 127 Cal. 355, that on the hearing of a motion for a new trial by a judge who had not tried the case, he stands in the shoes of the former judge, and has the same power, and is charged with the same duty, as if the motion had come before the former judge. The same rule must apply, and for the same reasons, where a judge decides the case on the evidence submitted to him, though taken before another judge. And we think the ordinary presumption in favor of the decision of the trial court prevails, just the same as where the trial judge has the witnesses before him. The rule as to when this court will interfere to set aside a finding of fact in the case of an alleged conflict in the evidence is, that it may rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion. (*Frace*

v. *Brown*, 117 Cal. 324, and cases cited; *Carter v. Lothian*, 133 Cal. 451.)

Appellant contends,—1. That Blood, Jr., was a trustee in the highest sense of the term, and bound to the utmost good faith towards the parties with whom he claimed to be acting; and 2. That defendant is not estopped to deny the execution of the note and mortgage.

There was evidence that plaintiff conveyed the land to defendant corporation, and that the mortgage and note in suit were executed in due form on behalf of the corporation, by its president and secretary, and by affixing the seal in use by the corporation, and that the papers were delivered to plaintiff. This is not disputed, but it is disputed that these officers were duly authorized to execute and deliver the documents, and this question has already been disposed of in the former appeal adversely to plaintiff. Assuming that the defendant is liable, the amount found to be due is supported by the evidence, as is also the fact that plaintiff is the owner and holder of the note and mortgage.

Laying aside for the moment the question as to whether Blood, Jr., was a trustee, as claimed by appellant, there is evidence to support finding 10, and we think the facts warrant the finding that defendant is estopped to deny the execution and delivery of the mortgage. These facts do not present the case of misrepresentation by the party to the action who would be benefited by the original transaction, made as an inducement to enter into the contract. Usually, an estoppel *in pais* involves such a situation. Here, however, the facts recited occurred after the deed was made to the corporation, and appellant contends that as plaintiff did not change his position on account of these acts, they could not constitute an estoppel. Briefly, the case is this: Plaintiff transferred the title of the land to the corporation, and took its mortgage in part payment, in the belief that the corporation had proceeded legally in executing the mortgage; the corporation neglected to pass the resolution of authority, but this was its, and not his, neglect; he surrendered possession to the corporation; it sold the crops, sold some of the land, cut down orchard trees, subdivided the tract into villa sites, collected rents, paid certain of the proceeds of sale of land and of crops and of rentals in discharge of its obligations; it retained possession nearly two years, when, in April, 1889,

not being able to meet its obligations originally entered into, it passed a resolution surrendering possession to plaintiff in lieu of paying interest, and asking for an extension of time to pay the principal, thus impliedly admitting its unpaid indebtedness, and it never disputed its liability until this suit was brought, which was five years after the purchase. These facts were all well known to and acquiesced in by the directors of the corporation, and the transaction generally was known to all the stockholders, who in fact formed the corporation for the purpose of making the purchase, and well knew that a mortgage was to be given to secure the unpaid balance of the purchase price. Upon every principle, there is an estoppel established. (*Main v. Casserly*, 67 Cal. 127.) It was there said: "Assuming that the contract of purchase was *ultra vires*, the law does not allow a corporation to retain the benefits which it has received from the contract, and escape liability upon it." (See also *Love v. Sierra Nevada L., W., & M. Co.*, 32 Cal. 639;¹ *Gribble v. Columbus Brewing Co.*, 100 Cal. 67.)

We do not understand respondent to controvert this doctrine seriously. But it is said that Blood, Jr., was a trustee of the corporation, and received a commission from plaintiff for the sale of the property, and that the persons for whom he acted were ignorant of that fact, and therefore plaintiff is in no position to plead estoppel or enforce the mortgage. The finding of the court is, that the corporation had notice of the fact that Blood, Jr., was acting as agent for plaintiff, and of the terms of the sale, and of the commissions to be paid his agent.

There is evidence tending to show the following facts: That Blood, Jr., was in the furniture business in 1887. He sold out his business, July 14th of that year, and engaged in the business of real estate agent or broker. Blood, Sen., had been talking of selling his ranch, and at the request of Blood, Jr., he placed it in the hands of the latter for sale. The ranch comprised 350 acres, fronting on the ocean, near Santa Barbara, and was thought to be available for villa sites. The price placed upon the property was three hundred dollars per acre, or one hundred and five thousand dollars; terms of sale, one half cash and one half in one year, secured by mortgage, and the agent was to receive five thousand dollars as commissions for making the sale. He spoke to several parties about purchasing, but finally found that the only way

to effect a sale was by an association of persons to buy it. He so informed his uncle, Blood, Sen., and that he "did not think it possible to find one person that wanted to put up so much money, and pay so much cash down." He laid the proposed investment before several persons, who agreed to make the purchase, and to form a corporation to take the title and manage and sell the property as a speculation. One of the principal parties in organizing the corporation was James L. Barker, who became a subscriber to the stock, and was made president and a director of the corporation. He was in the real estate business, and was also admitted to practice as an attorney at law, and prepared the articles of incorporation. His mother became a subscriber, through him as her agent for the management of her business. Barker was active in bringing the organization to a conclusion, and was looked to as the responsible head and manager of the corporation, and it was because he and his associate directors failed to pass the requisite resolution of authority to make the note and mortgage in question that these instruments were held to be unauthorized.

It turned out that there were not enough subscribers to the stock to make the first payment of one half the purchase price by each subscriber paying one half of the par value fixed for the shares, and plaintiff agreed to take a certain part of the stock. Blood, Jr., also subscribed for twenty shares, and became secretary of the corporation. The articles called for 300 shares, of the par value of \$500 each, and 210 shares were originally agreed to be taken. This made the required one hundred and five thousand dollars, one half of which would provide the first payment. The subscribers had a meeting before the corporation was fully organized, and voted a payment of one half the par value of the shares by each subscriber, and Blood, Jr., was authorized to pay over the money to plaintiff. He paid to plaintiff what he had received from the subscribers, and his proportion was paid by his commissions; other subscribers paid directly to plaintiff; the subscription by plaintiff, which appears to have been in the name of his wife, was probably taken in account as going to make up the required first payment. The evidence as to the amount of the cash payment is not clear. As to this payment, it is not very material, since plaintiff makes no claim for any deficit in respect of it, and since he deeded the property to the corporation and took the mortgage to secure the unpaid balance of

one half. The articles of incorporation, when filed, gave the names only of persons who had subscribed for 130 shares, and among the subscribers are plaintiff for ten shares and Blood, Jr., for ten shares. The stock-book, however, showed that on September 12, 1887, there were 223 shares issued, of which twenty shares were issued to Blood, Jr., and twenty shares to the wife of Blood, Sen. The articles of incorporation were filed August 20, 1887; they were signed by Barker, G. L. Hoffman, Blood, Jr., D. B. Lee, and Mary Ashley, who were named as directors in the articles, and served as such. The deed and mortgage were not delivered until about September 13, 1887.

There is evidence that plaintiff told Barker and Mrs. Ashley, two of the trustees, that he had promised his nephew five thousand dollars if he made a sale of the land. Plaintiff testified that he remembered telling these two persons, and he testified that he told all he had any conversation with concerning the sale. There is evidence that three of the five directors of the corporation knew that Blood, Jr., was to receive a commission. Director Hoffman was absent from the state at the time the mortgage was made, but returned shortly after and acted as a director. Director Lee testified to being present at some of the meetings, but could not remember which particular ones, and whether he knew of the commission does not appear; he was not asked the direct question. Some other stockholders knew about it. Mrs. Morris, a shareholder, testified that it was generally understood that a commission was to be paid. Two or three shareholders testified that they did not know it. There is no evidence that the fact was concealed. The price to be paid was believed at the time to be no greater than the value of the land for the purposes of the scheme proposed, and there is no evidence of any misrepresentation as to value by either plaintiff or Blood, Jr.; nearly all of the subscribers were familiar with the property, and all of them had means of ascertaining its value, and the evidence discloses no facts indicating fraud in the transaction. All the shareholders knew there was to be a mortgage given for one half of the purchase price.

Mr. Hoffman, one of the directors, testified: "About the time of this purchase, values were, anywhere, very much inflated. The market was very active, and the expectation of gain from these investments was very high. At the time

I subscribed to purchase this property on the basis of one hundred and five thousand dollars, I thought I was going to make some money out of it, or I should not have invested." Mr. McDuffie, a shareholder, testified: "Large expectations were entertained at that time with reference to the coming value of property situated along this coast, and adapted to country residence purposes, and there was a great speculation indulged in upon the basis of those expectations at that time. In my mind the boom collapsed really before the beginning of the year 1888, but the people here were not aware of it. I do not think that many of the people began to realize it had collapsed in the early part of the next year."

Whether all the shareholders knew of the commission paid Blood, Jr., is immaterial. If the directors had knowledge at the time the mortgage was authorized by them, or if the president and secretary of the corporation had such knowledge when they executed the mortgage, the corporation is chargeable with the knowledge. The rule of law seems to be, that notice to the individual shareholders is not binding upon the corporation as a collective body; but notice to its corporate agents, who have authority to represent the whole company, is notice to the corporation. (1 Morawetz on Private Corporations, secs. 540b, 540c. See cases collected in note to *Bank of Pittsburgh v. Whitehead*, 10 Watts, 397, in 36 Am. Dec. 186, 188-200.)

There is evidence that Blood, Jr., was authorized by plaintiff to find a purchaser for the land on the terms proposed, and had no authority as his agent beyond that. Blood, Jr., testified that when he "started to sell the property" he "had no idea of taking any interest in it as a purchaser." It was when it was found that sufficient stock was not subscribed to make up the cash payment by each subscriber paying fifty per cent of the par value of the shares, that plaintiff and Blood, Jr., became subscribers. Except in his capacity of secretary of the subsequently formed corporation, Blood, Jr., is not shown by the evidence to have been "chargeable with the high good faith exacted of all who stand in a relation of trust" towards the subscribers to the stock. They all understood the price asked for the land, and the terms of the proposed sale; they knew its value, and that Blood, Jr., was offering it on behalf of its owner, presumably as his agent, and there is much evidence tending to show that there were anticipations of profit entertained generally by

the investors. The evidence justified the finding that "none of the subscribers were deceived or misled by the subscriptions of any other subscribers, or by any representations of plaintiff or Blood, Jr." And we think there was evidence sufficient to warrant the finding that "none of the subscribers to the stock were pretended purchasers thereof, or were otherwise than *bona fide* subscribers in their own right, and none of said subscribers became such under an agreement that their shares, or the shares of any of them, were to be transferred to plaintiff, or that they, or any of them, were to be held harmless by plaintiff on account of any payments made by them for their stock." In short, we think there is evidence to support the findings, and that they support the judgment.

We do not think the case here is governed by the principles enunciated in *Ex-Mission L. & W. Co. v. Flash*, 97 Cal. 610, where the vendor was a promoter; nor in *Burbank v. Dennis*, 101 Cal. 90, which was an action for the recovery of secret profits. In the case here, plaintiff was not a promoter, nor was he a trustee or director, nor did he occupy any official relation to the corporation, through which he could be said to be dealing with himself. Although he became a stockholder, he had the right to sell his land to the corporation at the agreed price, there being no fraudulent misrepresentations in the transaction. This we understand to be held in *Densmore Oil Co. v. Densmore*, 63 Pa. St. 43, cited approvingly in *Burbank v. Dennis*, 101 Cal. 90. Nor was Blood, Jr., the general agent of plaintiff. He had authority to sell on the agreed terms, but he had no other authority. Plaintiff, of course, knew that his agent was to receive a commission, but the fact was not concealed from the corporation nor from the subscribers. In taking shares, not only did Blood, Jr., assist in effecting the purchase desired by all the investors, but he became liable in common with them for any indebtedness of the corporation. In point of fact, he never received any commissions, as the venture turned out. In the absence of fraud or fraudulent concealment, the corporation was not prejudiced by Blood, Jr., paying his proportion of the cash payment with his commission. The evidence justifies the finding that Blood, Jr., was not the agent of the subscribers, and did not act as such in obtaining subscribers, except to communicate to plaintiff some proposed modification of the terms of sale, and in the payment to plaintiff of a portion of the purchase-money by direction of the subscribers.

Appellant's briefs cover a wide range, but much of the discussion relates to principles as applicable to a state of facts assumed to be shown, but found, we think on sufficient evidence, against appellant. It is believed that sufficient has been said to fairly meet the essential points in the case. Some errors of law are assigned as having been committed at the trial, but we find in them nothing prejudicial to appellant.

It is advised that the judgment and order be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[L. A. No. 833. Department Two.—October 12, 1901.]

GREGORY PERKINS, JR., Assignee of Charles F. Kuhl,
an Insolvent Debtor, Respondent, v. MAIER & ZOBELIN BREWERY, Appellant.

INSOLVENCY—ACTION BY ASSIGNEE—INSUFFICIENT DEFENSE—CONDITIONAL TENDER.—In an action by the assignee of an insolvent debtor to recover personal property transferred to the defendant in violation of the insolvent law, an answer pleading a tender of possession of the property, coupled with the conditions that if the court shall finally determine that defendant was the owner, defendant would hold plaintiff responsible in damages, and that defendant did not by the tender waive his claim of ownership, presents no defense.

ID.—CONSTRUCTION OF INSOLVENT LAW—SURRENDER BY PREFERRED CREDITOR—CLAIMS TO DIVIDENDS.—Section 50 of the Insolvent Law of 1895, relating to a surrender of the possession of property by a preferred creditor, refers only to the proof of claims against the estate, and the right of such creditor to dividends therefrom, and has no reference to the pleadings or defenses in an action.

ID.—OWNERSHIP BY INSOLVENT—CONDITIONAL SALE—CONFLICTING EVIDENCE—SUPPORT OF FINDING.—A finding that the insolvent was the absolute owner of the property in controversy is sustained by evidence tending to prove the same, notwithstanding conflicting evidence of an oral bargain for a conditional sale of the property to

him by the defendant, leaving the title thereto in the defendant while the purchase-money remained unpaid.

ID.—REMEDIES. OF ASSIGNEE—REFLEVIN—DETINUE—TROVER.—Under the provisions of the Insolvent Act of 1895, the assignee has the same choice of remedies as a private individual. He may sue for the property of the insolvent, or its value in case a delivery cannot be had, with damages for its detention, in an action of replevin or detinue, or may sue in trover to recover the value thereof only, in case of a wrongful conversion by the defendant.

ID.—CONVERSION, HOW CONSTITUTED.—Conversion of the property does not necessarily imply that the defendant has destroyed or changed or transferred the property; but it takes place when the party charged takes the property, and claims and uses it as his own, and refuses to deliver it to the owner on demand.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. W. H. Clark, Judge.

The facts are stated in the opinion of the court.

J. T. Houx, for Appellant.

E. T. Dunning, for Respondent.

McFARLAND, J.—Action by assignee in insolvency to recover the value of certain personal property, consisting of wines, liquors, cigars, saloon fixtures, etc., alleged to have been the property of the insolvent Kuhl and to have been transferred by him, in violation of the insolvent law, to defendant, a few days before Kuhl filed his voluntary petition in insolvency. Judgment went for plaintiff in the court below, and defendant appealed from the judgment and from an order denying a new trial.

The appellant seeks a reversal on three grounds. The first point is, that the court erred in sustaining a demurrer to the "further answer and defense, and by way of supplemental answer," set up in paragraph 8 of the answer. In this part of the answer it is averred that on October 9, 1897, which was more than two months after the commencement of the action, defendant "tendered, in writing, the possession of the property mentioned in the complaint, with the right to transfer and convey the same," upon certain conditions mentioned in the answer as part of the tender. Appellant seems to rely for this point on section 50 of the Insolvent Law of 1895. That section, however, has no reference to

pleadings or defenses in an action, but refers to the proof of claims against the estate and the right to dividends; and it merely provides that one who has accepted any preference shall not be allowed to prove his claim or recover any dividend "until he shall have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference." But neither under that section, nor under the general law about pleadings, would this part of the answer be of any avail; for the alleged tender is coupled with the conditions, that "in the event that the court shall finally determine that the defendant was and is the owner, and at all times mentioned in such complaint had been the owner, this defendant would hold plaintiff for such damages as it might suffer by reason of any transfer by said plaintiff, and further notified plaintiff, as a part of said tender, that this defendant did not waive, by such tender of possession and right of transfer, defendant's claim of ownership of said property." There is no legal significance whatever in averring this curious sort of offer, and calling it a "tender" or "surrender"; no defense was thereby presented, and the demurrer was properly sustained.

2. The contention that there was no evidence to sustain the finding that Kuhl was the owner of the property, and that the court should have found that appellant was such owner, cannot be sustained. Kuhl had conducted the saloon in his own name, and under a license issued to him, for more than two years before the transfer; and although there was some verbal testimony—no written contract—that appellant had, two years before, made merely a conditional sale of the property to Kuhl, and that the title was to remain in appellant until Kuhl paid the purchase-money, which he had not done, still there was sufficient other evidence to warrant the court in finding that Kuhl was the absolute owner.

3. Appellant contends for reversal on the ground that there could be no judgment for the value of the property without an averment and finding that a redelivery of the same could not be had. This contention is based on subdivision 9 of section 25 of the Insolvent Law of 1895, which gives power to the assignee "to have and recover" any property from the person who had received it through a transfer, etc., made contrary to the provisions of the act; "or in a case a redelivery cannot be had, to recover the value thereof."

with damages for the detention." It is contended that this section only gives to the assignee the power to commence an action in the nature of replevin or detinue; but section 59 of the act provides that when any transfer of property has been made contrary to the provisions of the act, "the assignee, or receiver, may recover the property, or *the value thereof*, as assets of such insolvent debtor." These provisions, taken together, put the assignee, so far as remedy is concerned, in the same position as that of any other person who is grieved by the wrongful taking of his personal property. If he prefers recovering the specific property to damages for a conversion, he may bring an action which would have been, at common law, detinue or replevin, and is, under our system, generally called "claim and delivery"; or if he prefers it, his action may be to recover damages for conversion, which, at common law, was trover. And this latter is the form of action in the case at bar. It is true that it is unnecessarily stated in one part of the complaint that defendant retains possession of the property; but that does not change the character of the action. Conversion of property to his own use does not necessarily mean that the defendant destroyed it, or ate it, or in any way changed its form, or transferred it to another; it occurs when the party charged takes the property and claims and uses it as his own, and refuses to deliver it to the owner on the latter's demand—as in the case at bar. The action was therefore properly brought, and the judgment was properly entered for damages for conversion.

The judgment and order appealed from are affirmed.

Beatty, C. J., and Henshaw, J., concurred.

[S. F. No. 2818. In Bank.—October 12, 1901.]

FOUNTAIN WATER COMPANY et al., Petitioners, v.
S. K. DOUGHERTY, Judge of the Superior Court of
Sonoma County, Respondent.

NEW TRIAL—PREMATURE PROCEEDINGS—MINUTE ENTRY—PROCEEDINGS
AFTER FINDINGS AND JUDGMENT—MANDAMUS TO SETTLE STATEMENT.
—Proceedings on motion for a new trial, based solely upon a minute entry of a decision, which did not purport to be a judgment, and was not signed, it appearing that no findings or judgment had been filed or entered, were premature and invalid; and where findings were filed and judgment entered after denial of the premature motion, new proceedings for a new trial, thereafter instituted in due form, were the only valid proceedings. It is no defense to *mandamus* to compel the settlement of a statement upon such new proceedings, that a statement had been settled and certified upon the premature proceedings.

MANDAMUS in the Supreme Court to compel the settlement of a statement on motion for a new trial in the Superior Court of Sonoma County. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

John M. Barnett, and James W. Oates, for Petitioners.

S. K. Dougherty, Respondent, *in pro. per.*

THE COURT.—Application for writ of *mandamus* requiring the defendant to settle the plaintiff's proposed statement on motion for new trial in a suit for the condemnation of land brought by the city of Santa Rosa against him and another. The case is submitted on demurrer to the petition, and, briefly stated, is as follows: A verdict was rendered in the case, on certain issues, December 29, 1900, and "thereupon," it is alleged, "the court ordered the clerk to enter the following findings and judgment, which were then and there entered by the clerk in the minute-book, to wit." Here follow the "findings and judgment" referred to. These were not signed by the judge or entered in the judgment-book. But they were treated by the parties and by the court as constituting the decision and judgment in the case; and accordingly, proceedings for a new trial having been taken by the defendant, the Fountain Water Company

(plaintiff here), a statement on motion for a new trial was settled and certified by the judge April 24, 1901, the new trial being subsequently denied. But, on the next day after the settlement of the statement (April 25, 1901), another judgment was made and signed by the judge, containing findings of fact, and (as ordered) entered *nunc pro tunc* as of December 29, 1900—the date of the verdict, and of the former judgment and findings, if they can be so called; and, subsequently, other proceedings were taken for new trial by the same defendant, resulting in the presentation of another statement to the judge for settlement, which he refused to settle, on the grounds (in effect) that a statement had already been settled and certified, and that the only reason suggested for the settlement of the new statement was the supposed incorporation, in the last judgment, of a new finding.

The validity of the former ground must depend upon the question whether, prior to the findings and judgment signed by the judge April 25, 1901, other findings had been filed and another judgment entered. If so, the additional finding contained in the last judgment, if material, would be invalid for want of power in the court to make it, and the proceedings for new trial therefore nugatory; and on this assumption the court would have been justified in refusing to sign the statement or otherwise to act with regard to the proceedings. (*County of Los Angeles v. Lankershim*, 100 Cal. 532, and cases cited.) But from the allegations of the petition it appears that the supposed findings and judgment consisted of a mere minute entry by the clerk, unsigned by the judge; and from the allegations of the complaint it must be taken, also, that the document entered in the minute-book was not entered in the judgment-book. (Code Civ. Proc., sec. 668.) For, though there is no direct allegation that it was not so entered, the fact sufficiently appears from the nature of the entry,—which does not purport to be a judgment,—and from the fact that after the verdict was filed the case was “reserved and submitted for further consideration and decision,” and especially for consideration and decision of “all questions of law and fact not passed upon by the jury,” and also from the fact that no findings were filed by the judge. (Code Civ. Proc., secs. 532, 1256.) Upon the facts alleged, therefore, it appears that there were no findings prior to the findings and judgment signed by the judge and filed April

25, 1901. It follows that the first proceedings for new trial were premature, and those following the judgment of April 25, 1901, the only valid proceedings (*Reclamation District No. 556 v. Thisby*, 131 Cal. 574.), and that the statements should have been settled by the judge.

Let the writ issue as prayed for.

[S. F. No. 2414. Department Two.—October 12, 1901.]

ANN GORMAN, Respondent, v. PATRICK GORMAN, Appellant.

DIVORCE—EXTREME CRUELTY—DIVISION OF COMMUNITY PROPERTY—

DISCRETION OF COURT.—Where a divorce was granted to the husband, as cross-complainant, on the ground of the extreme cruelty of the wife, who sued for a divorce as plaintiff, the court had discretion to award seven twelfths of the community property, including the homestead, to the defendant, and to award the remaining five twelfths to the plaintiff.

ID.—APPEAL—REVIEW OF DISCRETION—EVIDENCE NOT RETURNED.—Although the discretionary action of the court in such a case is expressly made, by section 146 of the Civil Code, subject to revision upon appeal to this court, yet where the evidence is not in the record, and this court has not “all the facts of the case and the condition of the parties” before it, and cannot say that the division was not just, the action of the superior court in dividing the property will not be disturbed upon appeal of the divorced husband.

ID.—CONSTRUCTION OF CODE PROVISIONS—LIMITS OF DISCRETION.—The provisions of section 146 of the Civil Code, relating to the division of the community property, where a divorce is granted on the ground of extreme cruelty or adultery, though impliedly requiring that more than half of the community property shall be awarded to the innocent party, does not otherwise limit the discretion of the trial court, in making the award, by any general rule. The proportion should depend upon the particular circumstances of each case. Where the trial court has exercised a legal discretion, this court, though clothed with the power of “revision” under the statute, will be slow to interfere with that discretion.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William R. Daingerfield, Judge.

The facts are stated in the opinion.

George D. Collins, for Appellant.

Joseph H. Mayer, A. D. Lemon, and A. E. Mack, for Respondent.

GRAY, C.—In this action the defendant was granted a divorce on the ground of the extreme cruelty of plaintiff, and awarded seven twelfths of the community property, including the homestead.

The plaintiff was awarded the remaining five twelfths. The aggregate value of all said property was found to be \$7,748.50. The defendant appeals from that portion of the decree relating to the division of the property, and claims that he should have had more than seven twelfths thereof.

The appeal is presented on the judgment roll, the evidence not being in the record. The findings follow the cross-complaint as to the charge of cruelty, setting forth generally two instances of violent beatings sustained by defendant at the hands of plaintiff, and that in consequence of the last of these outbreaks the defendant was compelled to flee from his home and remain away therefrom as a necessary measure to his personal safety. Whether there was any cause or provocation for this violent conduct on the part of the female spouse does not appear. Nor do the findings enlighten us as to defendant's ability or inability to support himself by means other than the property in controversy.

Where the divorce is granted on the ground of adultery or extreme cruelty, section 146 of the Civil Code leaves the disposition of the community property, in the first instance, to the discretion of the trial court, with, perhaps, the qualification, inferred from a reading of the entire section, that, as a general rule, more than one half of such property must be decreed to the innocent spouse in such a case. (*Eslinger v. Eslinger*, 47 Cal. 62; *Brown v. Brown*, 60 Cal. 579.) It is true that section 148 of the Civil Code makes the action of the trial court in this connection subject to "revision" on appeal, in all particulars, including those matters which are in the discretion of the court below; but on the record before us we are not disposed to interfere with the action of the trial court; for it appears that that court had advantages for reaching a just conclusion in the premises which we do not possess. The parties and witnesses were before it, with

the details of the evidence, while here we have but the conclusions reached in the findings. Not having "all the facts of the case and the condition of the parties" (Civ. Code, sec. 146, subd. 1.) before us, we cannot very well say what would be a just division of the property; but so far as we can see, it was justly divided between the parties by the trial court.

We find the cases of *Eslinger v. Eslinger*, 47 Cal. 62, and *Brown v. Brown*, 60 Cal. 579, cited in appellant's brief in support of the following proposition: "The proper proportion of the community property to be awarded the innocent party, where the divorce is granted upon the ground of extreme cruelty, is held to be *three fourths*." We do not understand that either of these cases lays down any such general rule, but only that, under the circumstances disclosed in each of the cases, three quarters of the community property was the proper amount to go to the innocent party. Indeed, if the statute is not to be disregarded, no general rule as to the matter can be laid down by the court, but each case must be left to the discretion of the court, within the limits to be implied from the statute. In the two cases *supra*, the reason why the appellate court interfered with the disposition of the property made by the lower court appears to have been, that the lower court misunderstood or misinterpreted the statute; and there is no evidence in either of the cases that this court would have modified the division made, if the trial court had given the innocent party any amount in excess of one half of the community property; but as the trial court had really failed to exercise a legal discretion in the matter, and it therefore became necessary for the appellate court to exercise its discretion in the premises, the division was made by it in accordance with what appeared to be just, from such record as was before it in the case. Here, however, the trial court has exercised a legal discretion in the case, and this court should not be swift to interfere with that discretion, even though it be clothed with the power of "revision" under the statute.

We advise that the decree be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the decree is affirmed. McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1938. Department One.—October 25, 1901.]

PALACE HARDWARE COMPANY, Respondent, v. WILLIAM M. SMITH, Appellant.

SETTING ASIDE JUDGMENT OF DISMISSAL—MISTAKE OF PLAINTIFF—SETTLEMENT OF ACTION—OVERSIGHT OF ASSIGNED CLAIM—APPEAL.

—A plaintiff who, by mistaken oversight of a small assigned claim, included in the complaint, but not in the prayer for judgment, settled the action for the amount of the principal claim and costs, and consented to a judgment of dismissal thereof, may, upon exercising diligence and taking proper steps after discovery of the mistake, be relieved against the judgment of dismissal, under section 473 of the Code of Civil Procedure; and an order granting such relief will not be disturbed upon appeal.

ID.—CONSTRUCTION OF CODE—CONSENT TO JUDGMENT—RELIEF AGAINST MISTAKE—MUTUALITY—JURISDICTION.—Section 473 of the Code of Civil Procedure is remedial, and is to be liberally construed, so as to include a judgment in favor of as well as against the moving party, and to include a judgment of dismissal against the moving party, consented to by him to his injury, under a mistake of fact, which is excusable under the terms of the statute. The mistake relieved against need not be mutual; nor can the entry of the dismissal by the consent or order of the plaintiff under the mistake of fact on his part, whatever effect it may have as a retraxit in bar of another action, affect the jurisdiction of the court to grant relief against the mistake, by vacating the judgment under the code provision.

ID.—DISCRETION OF TRIAL COURT—APPEAL.—Applications for relief under section 473 of the Code of Civil Procedure are addressed to the sound legal discretion of the trial court, and its action in granting or refusing such application will not be disturbed upon appeal, unless it clearly appears that the court has abused its discretion.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating a judgment of dismissal. Frank H. Dunne, Judge.

The facts are stated in the opinion.

Frank Sullivan, for Appellant.

William H. Jordan, and Walter S. Brann, for Respondent.

HAYNES, C.—The plaintiff, by its attorney, William H. Jordan, Esq., brought an action in the superior court against the defendant, upon two separate causes of action, the first of

which, amounting to \$320.80, accrued to plaintiff directly, and the second cause of action, amounting to \$105.73, accrued to the Pacific Refining and Roofing Company, and was by it assigned to said plaintiff and included in said action.

On October 20, 1898, while said action was pending, Mr. D. C. Murphy, representing defendant's attorney, Mr. Frank Sullivan, called upon plaintiff's attorney and inquired what the figures would be for a settlement of said action. Plaintiff's attorney thereupon called for the papers in said cause, and, taking out the complaint, looked at the prayer for judgment and saw the amount stated at \$320.80, and thereupon said he would advise his client to settle for said sum and the costs, aggregating \$10, and that if payment would be made immediately he would advise a settlement at \$330; that at the time of making said statement he had forgotten about said assigned claim for the sum of \$105.73, and did not know that it was not included in the prayer, but supposed that said sum of \$320.80 was plaintiff's entire claim in said action; that afterwards, Mr. Murphy called upon plaintiff's attorney with a check for said sum of \$330, and requested a dismissal of said action and a substitution of attorneys, which requests Mr. Jordan complied with; that on October 25th he examined said complaint and found that said assigned cause of action was included therein, but was not included in the amount prayed for, and had not been settled, and immediately informed defendant's attorney of the fact, and requested a correction of the error by a payment of said assigned claim, or if that were not done, he would repay the money received and take steps to set aside the settlement and restore the cause to the calendar. Defendant's attorney having declined to do either, plaintiff's attorney thereupon tendered to him the money received, and that tender being refused, also tendered it to the defendant personally, who also refused to receive it, and thereupon the plaintiff, after due notice, moved the court to vacate the judgment of dismissal which the defendant had caused to be entered, and to cancel the substitution of counsel which had been given, and to restore Mr. Jordan to his position as attorney for the plaintiff, and brought into court the money he had received from the defendant. Said motion was based upon the files and records in said cause, and upon affidavits, the substance of which is above stated.

Counter-affidavits were made by defendant, Smith, and by Frank J. Sullivan, his attorney, and by D. C. Murphy, who represented Mr. Sullivan in making the settlement. Mr. Smith's affidavit is to the effect that he authorized said settlement for said sum of \$330; that he did not understand or believe that said action was to be settled for the full amount sued for; that he settled other claims of lien against the same building for 75 and 80 per cent; that the Pacific Refining and Roofing Company had offered to settle for 85 per cent; but that affiant was then unwilling to pay more than 80 per cent, and would not have consented to pay the full amount.

The affidavit of Mr. Sullivan is to the effect that he is defendant's attorney; that he did not acknowledge to Lloyd C. Comegys (Mr. Jordan's clerk), or to any one, that said sum of \$330 had been paid as the full amount of plaintiff's claim, or that it had not been accepted as any percentage of said claim, or that said amount did not include the said assigned claim.

Mr. Murphy's affidavit is, in substance, that he represented Mr. Sullivan in making said settlement; that prior to obtaining said dismissal and substitution he asked Mr. Jordan to state the lowest figures at which he would advise his client to settle said action, and was informed, "\$320, plus \$10, costs"; that he did not acknowledge to Comegys, or to any one, that said dismissal had been obtained under a mistake and misconception of the amount due the plaintiff, or that it was the intention of the defendant or of said Jordan to settle the plaintiff's claim for the full amount, or that it was not the said Jordan's intention to accept any percentage of said claim, and that affiant did not acknowledge that the giving of said dismissal was the result of a mistake on the part of said Jordan.

Upon the hearing, the plaintiff's motion was granted, and the defendant appeals.

It will be observed that both Mr. Sullivan and Mr. Murphy, while denying that they admitted to Mr. Comegys, or to any one else, "that said dismissal had been obtained under a mistake and misconception of the amount due the plaintiff," do not deny that in fact Mr. Jordan did make the settlement and grant a dismissal of the action under a mistake and misapprehension of the amount due the plaintiff.

Respondent's motion was made under that portion of section 473 of the Code of Civil Procedure which provides

that the court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." In *Rauer v. Wolf*, 115 Cal. 100, this court, after quoting the above portion of said section, added: "It is well settled, however, that applications for relief in such cases are addressed to the sound legal discretion of the trial court, and that its action in granting or refusing such an application will not be disturbed on appeal, unless it clearly appears that the court abused its discretion."

Appellant contends that the plaintiff did not bring himself within the provisions of section 473 of the Code of Civil Procedure, for several reasons, to the effect that plaintiff made no affidavit in support of his motion; that the proceeding to be relieved against, under said section, must be one taken *against* the moving party; that here the judgment of dismissal was rendered at his own request, and therefore was not taken against him. These contentions are without merit. In *Brackett v. Banegas*, 99 Cal. 623, it was held that a party in whose favor a judgment has been rendered is entitled to relief under said section, as well as the party against whom judgment has been rendered, and that said section is remedial, and should be liberally construed. But here, a judgment of dismissal, sending the plaintiff out of court without the relief to which he is entitled, is a judgment against him and in favor of the defendant; and if he consented to the dismissal to his injury, under a mistake of fact, excusable under the terms of the statute, he is not barred of relief.

Appellant also contends that the court can not relieve against a mistake of fact, unless the mistake is mutual. Here, the mistake was not mutual. It is not asserted that defendant's attorney was not fully aware of the mistake of Mr. Jordan as to the amount involved in plaintiff's action, and how defendant's knowledge that plaintiff's offer was made under a mistake can defeat his right to relief is not apparent to the ordinary understanding. In *Moore v. Copp*, 119 Cal. 429, 436, it is said: "It is not necessary that a mistake of fact should be mutual, as appellant claims. (Civ. Code, sec. 1577.) Nor is it true, as contended, that a contract cannot be set aside for the mistake of one of the parties, unless the contract was induced and the mistake arose from the fraud of the other party."

It is further contended that "the entry of a judgment of dismissal on the order of the plaintiff is final, and the court loses jurisdiction, and cannot vacate the judgment." Whether, in the absence of the statute, a voluntary dismissal amounts to a retraxit, and bars a future action, need not be considered. If the plaintiff is entitled to relief under the statute, it is not material whether, in its absence, he could have relief either at law or in equity, and authorities upon that point need not be examined.

Wolters v. Rossi (Cal.), 57 Pac. Rep. 73, has no application. There, the plaintiff dismissed the action before an answer seeking affirmative relief had been filed, and it was held that the dismissal could not be vacated on the application of *defendant* to permit the consolidation of such action with another.

The contention that defendant could not thus be deprived of his property without due process of law, in violation of the constitution of the United States, does not merit consideration; and the further contention that the defendant "was entitled to a trial by jury as to the fact of the mistake of arithmetic on the part of the plaintiff's attorney," may be disposed of with the like remark.

We find no ground upon which the order appealed from should be reversed, and advise that it be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

CXXXIV. CAL.—25

[Crim. No. 773. Department One.—October 25, 1901.]

**THE PEOPLE, Respondent, v. WILLIAM H. PRATHER,
Appellant, and CHARLES DAVIS, Co-defendant.**

CRIMINAL LAW—GRAND LARCENY—TAKING STOLEN GOODS INTO ANOTHER COUNTY — VENUE — JURISDICTION OF OFFENSE — INFORMATION. —
Under section 786 of the Penal Code, providing that "when property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county," an information for grand larceny, charging that the property described was stolen by the defendant in another county, and that the property so stolen was brought by the defendant into the county of the venue, shows jurisdiction of the original offense in the latter county. Such information need not allege that any larceny was committed in the county of the venue, nor that the taking of the goods into that county was felonious.

APPEAL from a judgment of the Superior Court of Sacramento County. E. C. Hart, Judge.

The facts are stated in the opinion of the court.

J. Charles Jones, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

GAROUTTE, J.—William H. Prather has been convicted of the crime of grand larceny, and appeals from the judgment rendered against him. The attention of the court will be directed first to a consideration of the sufficiency of the information.

Section 786 of the Penal Code provides: "When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county." The present prosecution is based upon the provisions of the aforesaid section of the code, the subject-matter of the larceny being forty-eight sacks of buckwheat, charged to have been stolen in the county of Yolo by defendants, and thereafter brought by them into the county of Sacramento. That portion of the information to which our attention will be directed is as follows: "The said William H. Prather and Charles Davis, on the — day of March, A. D., 1900, at the said county of

Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, and feloniously steal, take, and carry away from A. D. Miller and Adolph Jean, in the county of Yolo, in the state of California, forty-eight sacks of buckwheat, then and there the personal property of the said A. D. Miller and Adolph Jean, and said personal property being then and there of the value of one hundred dollars, in lawful money of the United States of America; that after such unlawful and felonious stealing, taking, and carrying away as aforesaid, the said defendants did then and there bring said personal property, so taken, stolen, and carried away as aforesaid, into the said county of Sacramento, in the state of California." In the first part of this information, it is charged that the defendants, at the county of Sacramento, did take, steal, and carry away from Miller and Jean, in the county of Yolo, this buckwheat. We are at a loss to see how it could be done. It would seem to be a physical impossibility for these defendants, at the county of Sacramento, to steal this buckwheat in the county of Yolo. But no demurrer was interposed upon this ground, and this defect in the information is not fatal to the pleading. After the information alleges the property to have been stolen in Yolo County, it alleges that the defendants did "bring said personal property, so taken, stolen, and carried away as aforesaid, into the county of Sacramento." This part of the information is the vital part of it, so far as the county of Sacramento is concerned, for in this language must be found sufficient to give the superior court of Sacramento County jurisdiction of the offense. If the court did not gain jurisdiction of the offense by this language, it had no jurisdiction whatever to try these defendants.

Mr. Bishop, in his work on New Criminal Procedure (vol. 1, sec. 59), says: "Though, to constitute larceny, a taking and carrying away of the goods by trespass and an intent to steal them must concur, if, after one has taken what completes the theft, he continues traveling away with and still intending to steal them, each step may be treated as a new trespass and fresh larceny; so that he may be indicted either in the county where he first took the goods, or in any other into which, the intent to steal continuing, he carries them. . . . It is immaterial to this result whether the taking to the new county is immediate, or long after the original theft. But it must be felonious in the new county,—as, for ex-

ample," etc. This principle of law is elementary, and involves the proposition that a new larceny is committed in every county to which the thief takes the property; and the correct information in such a case should charge the commission of the crime of larceny in the county where the person is to be prosecuted. Under such circumstances, the first larceny is a mere matter of evidence, and should not be alleged. (*People v. Mellon*, 40 Cal. 648, 654; *People v. Scott*, 74 Cal. 94.)

The principle of law illustrated by the quotation from Mr. Bishop is wholly different from the principle of law laid down by the section of the Penal Code quoted. That section does not attempt to create either a new or a different crime. It refers entirely to the *place of trial* of certain crimes. Its sole purpose and effect is to give jurisdiction of certain offenses to the courts of certain counties, which otherwise had no jurisdiction of those offenses. When the property stolen is taken by the thief into another county, *instantly* the courts of that county have jurisdiction to prosecute the thief, —not for some new offense, but for the offense originally committed, whether that crime be larceny, robbery, burglary, or embezzlement. This is the plain meaning of the section. It is apparent that such is its meaning; for it would be impossible to charge a burglary or robbery, or possibly an embezzlement, in another county than that in which it was committed. (*People v. Scott*, 74 Cal. 94.) It not being possible to charge such offenses in the second county, it is plain that it is the original offense which may be tried in "another county," and the information, after alleging the commission of the crime in the first county, should then allege the jurisdictional fact that the property was thereafter brought by the thief into the county where the information is filed. This being the proper form of the pleading, it follows that it is unnecessary to allege a taking in the second county, or the value of the property in that county, or that the property was feloniously taken into the county. The statute does not demand that any of these conditions should exist, and therefore it is unnecessary to allege them. In *People v. Scott*, 74 Cal. 94,—a case of burglary prosecuted in the county to which the stolen goods were taken,—the court said: "These considerations go to the jurisdiction of the court, and not to the form of charging the facts constituting the offense, and are referred to only for the purpose

of showing that, except as provided by statute, crime is regarded as local."

It is claimed that the taking into the second county should be charged in the information as a *felonious* taking; for the rule of law being that all presumptions should be resolved in favor of a defendant's innocence, it must be presumed that the taking into the second county was an innocent taking, the pleading not stating to the contrary; and counsel says, perchance the owner, after the commission of the crime in the first county, vested title in the stolen goods in the thief before they were taken by him to the second county. *State v. Brown*, 8 Nev. 208, appears to be in line with these suggestions. That case seems to hold that, under a statute similar to the one here quoted, the offense should be charged as having been committed in the county where the information is filed. This we deem to be a mistaken view of the statute, for, as already suggested, such allegations could not be made in cases of burglary and robbery, and in construing this section all of the crimes named therein stand upon common ground. In the leading case of *Haskins v. People*, 16 N. Y. 344, 350, which is quoted with approval in the Nevada case, this question is made very plain. The court there said: "The prisoner might, under the statute, have been indicted in Onondaga for the burglary committed in Cayuga. In such a case, I think the indictment must have been special. The burglarious entry could not have been charged to have been made in Onondaga without a variance; and if it had stated it to have been made in Cayuga, according to the fact, without a statement that the property had been brought into Onondaga, it would have appeared that the courts of the latter county had no jurisdiction to try the offense. The difference between the two cases is this: Burglaries may be tried out of their proper counties in certain special cases—that is, where the goods burglariously taken are carried into another county by the offenders—but this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there."

As suggested, it is urged by counsel that the information should charge the taking of the fruits of the crime into the second county to be a felonious taking. Now, let us suppose the fruits of the crime—a burglary—to be property of five dollars in value. The court cannot see how the taking of

this property into the second county could be charged or proven to be a felonious taking into that county. Yet there can be no question but that, by the provisions of the section quoted, a person could be tried and convicted in the second county of such a burglary. The same illustration could be made as to the fruits of a robbery. In *People v. Staples*, 91 Cal. 27, an information similar to that here involved was sustained, and likewise was the same result reached in *People v. Jochinsky*, 106 Cal. 638. It may be well to suggest that the *Staples* case was not a prosecution based upon the section of the Penal Code here involved. In the *Brown* case, hereinbefore cited, judgment was reversed upon the ground that "the indictment fails to charge that any offense was committed within the county where it was found." The proper construction of this statute is, that where prosecutions are had under it, the indictment or information need not charge an offense in the "other county," but as to that county may simply charge that the defendant brought the stolen goods into it; this allegation gives the second county jurisdiction of the original offense.

Various exceptions were taken to the rulings of the court in the matter of giving and refusing certain instructions asked. Those exceptions have all been carefully examined. The points made by them are technical in the extreme, and the court finds no substantial error therein.

For the foregoing reasons the judgment is affirmed.

Harrison, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Upon the denial of a hearing in Bank, Beatty, C. J., filed the following opinion on November 23, 1901:—

BEATTY, C. J.—The decision of the Department is placed upon a ground which brings it in direct conflict with the principle decided in *People v. Powell*, 87 Cal. 348—a case decided in Bank without any dissent. It was there held that any attempt by the legislature to subject a defendant in a criminal case to the jurisdiction of the courts of a county, other than that in which the offense is charged to have been committed, is unconstitutional and void. It is here decided that the superior court of Sacramento County had jurisdiction to try the defendants on a charge that they

committed a larceny in Yolo County. The decision is rested solely upon a construction of the statute, regardless of the former solemn decision of the whole court that a similar statute was unconstitutional. For myself, I adhere to the doctrine of the Powell case, which was most maturely considered by the court, and even if it is now to be set aside, I think it should not be done, except by the full court, nor without weighty reasons assigned for such action.

It was not even necessary to impeach the doctrine of the Powell case, in order to sustain these convictions, for in a precisely similar case this court, by unanimous decision, has held that an indictment like this did charge the offense to have been committed in the county to which the stolen property was taken by the perpetrator of the theft. (*People v. Staples*, 91 Cal. 27.)

I think the conclusion of the court is correct, but the principle of the decision erroneous. •

[S. F. No. 1838. Department One.—October 26, 1901.]

M. H. LAFHEY, Respondent, v. MELVINA KAUFMAN
and E. L. KAUFMAN, Appellants.

VENDOR AND PURCHASER—VERBAL CONTRACT—ACTION TO RECOVER BACK MONEY PAID—SUFFICIENCY OF COMPLAINT.—A purchaser of land under a verbal contract, who has paid part of the purchase-money, cannot recover it back from the vendor, merely because the contract is verbal; but, to sustain an action therefor, he must allege and prove full performance or tender of performance of the terms of the verbal contract on his part, and the default of the vendor in refusing to convey upon proper tender and demand for a deed, or that the vendor had become unable to carry out the contract; and if the complaint fails to show such facts, it does not state a cause of action.

ID.—ANSWER OF VENDOR—EVIDENCE.—The vendor was entitled to give evidence to prove an answer setting up continual readiness and willingness to convey the land by sufficient deed upon full performance of the contract on the plaintiff's part and that plaintiff has refused fully to perform the contract; and it was error for the court to refuse to hear such evidence.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. A. S. Kittredge, Judge.

The facts are stated in the opinion.

I. S. Thompson, for Appellants.

J. R. Welch, for Respondent.

COOPER, C.—Plaintiff recovered judgment, and defendants appeal from the judgment and order denying their motion for a new trial.

The amended complaint alleges that defendant Melvina orally agreed to convey to plaintiff a certain one-half acre of land for the sum of fifteen hundred dollars, payable five hundred dollars cash, five hundred dollars on the delivery of the deed, and the remaining five hundred dollars by note and mortgage upon the land; that, in accordance with the agreement, plaintiff paid the five hundred dollars cash, and that defendant Melvina has failed and refused to convey to plaintiff the said land; that plaintiff has demanded the return of the five hundred dollars so paid, but defendant Melvina has refused, and still refuses, to return the same.

To the said complaint defendants demurred, upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants answered. In the answer, defendants allege that the defendant Melvina has always been, and now is, ready and willing to convey the said land, and to deliver a sufficient deed upon the payment of the remaining five hundred dollars and the execution of the note and mortgage, but that plaintiff has at all times refused to pay the five hundred dollars and execute the note and mortgage as per the agreement.

The court below refused to allow the defendants to prove the allegations of their answer, and in doing so proceeded upon the theory that the contract being oral, the same was and is void, and that plaintiff can recover the five hundred dollars without offering to pay the balance, and without default of defendant Melvina. As the demurrer was overruled, and the case tried upon the theory that money paid on an oral contract for the sale of land may be recovered back by the vendee without any default of the vendor and no

tender of balance due by the vendee, this may be regarded as the only question in the case.

We think the court was in error in overruling the demurrer and in refusing to hear defendants' evidence. The action is not one to enforce the specific performance of a parol contract for the sale of lands, nor is it one in which a defense is based upon the statute of frauds.

The plaintiff, having made the contract, which is not unlawful nor against public policy, and having paid the money thereunder, cannot, of his own volition, and without fault of defendants, come into court and receive the assistance thereof to recover the money voluntarily paid. The money was paid for a valid consideration—to wit, the agreement to convey the land. It was only part of the consideration for such conveyance. The conveyance was not to be made until the balance of the consideration was paid according to the agreement.

Plaintiff, in order to entitle him to relief, must allege and show that he paid, or offered to pay, the balance of the consideration. The general rule is, that the vendee is not entitled to a conveyance until the full payment of the purchase-money, and the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other. The plaintiff has wholly failed to allege any tender by him of the five hundred dollars remaining due, or that he offered to execute the note and mortgage as he agreed, or that he ever demanded a deed. He alleges a refusal to convey, but it was not incumbent upon defendant Melvina to convey until the consideration was paid or offered to be paid by plaintiff as he had agreed.

The right of the vendee of land, under a verbal contract, to recover the money or other consideration paid is by all the authorities confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part. (Browne on the Statute of Frauds, sec. 122; 2 Reed on the Statute of Frauds, sec. 738; Wood on Frauds, sec. 235; *Abbott v. Draper*, 4 Denio, 51; *Green v. Green*, 9 Cow. 46; *Coughlin v. Knowles*, 7 Met. 57;¹ *Wetherbee v. Potter*, 99 Mass. 354, 361.)

¹ 39 Am. Dec. 759.

We advise that the judgment and order be reversed and the court below directed to sustain the demurrer and allow plaintiff to amend his complaint if so advised.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the court below directed to sustain the demurrer and allow plaintiff to amend his complaint if so advised.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 1830. Department One.—October 26, 1901.]

JOHN LOFTIS, Respondent, v. MARY E. MARSHALL,
Administratrix, etc., et al., Appellants.

ACTION TO QUIET TITLE—DEED VOID FOR FRAUD—EVIDENCE—FORMER JUDGMENT IN EJECTMENT—ESTOPPEL.—In an action to quiet plaintiff's title to land, as against a deed fraudulently procured by his wife and her son, while plaintiff was incapacitated, a judgment in ejectment against the plaintiff in a former action, brought against the wife and the tenant of the administratrix of a deceased son, to whom the premises were conveyed by the wife, with notice of the fraud, and the administratrix, in her personal capacity, who was not in possession of the land, is not admissible in evidence as an estoppel against the plaintiff, in favor of the administratrix and a child of the deceased son.

ID.—ADJUDICATION IN EJECTMENT—DEFENDANT NOT IN POSSESSION.—An adjudication in ejectment, in favor of a defendant who was not in possession of the property, does not involve the question of the plaintiff's title, as to such defendant, and could not estop the plaintiff to show that he had title, in an action to quiet his title against such defendant.

ID.—JUDGMENT IN FAVOR OF TENANT—ESTOPPEL IN FAVOR OF LANDLORD—PARTIES.—A judgment in ejectment, in favor of a tenant, is not conclusive as an estoppel in favor of the landlord, against the plaintiff in ejectment, unless the landlord appeared openly in the case, and was permitted by the court to undertake the defense to the action, so as to have control of the case as a party thereto; and the fact that the tenant was represented by an attorney employed by the landlord is not sufficient to establish the estoppel.

ID.—SUFFICIENCY OF COMPLAINT—STATUTE OF LIMITATIONS—IGNORANCE OF FRAUD.—Where the plaintiff alleged a fraud, committed by inducing him to sign a deed while incapacitated from drunkenness, and upon the false representation that it was a letter, and that in pursuance of the conspiracy and the fraudulent and deceitful acts of the persons who committed the alleged fraud, plaintiff was kept in ignorance of the grant or deed until a date less than three years before the commencement of the action, the complaint sufficiently alleged the discovery of the fraud within that period.

ID.—IGNORANCE OF SUBSEQUENT DEED AND RECORD.—It was not necessary for the plaintiff to aver ignorance of the subsequent deed from plaintiff's wife to her son, nor ignorance of the recording thereof.

ID.—DISCOVERY OF FRAUD NOT MATERIAL—VOID DEED—LIMITATION—ADVERSE POSSESSION.—Assuming the fraudulent deed to be void, the discovery of the fraud was not material, and an action could be brought at any time, except as against an adverse possession of five years.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

James F. Tevlin, for Appellants.

Nagle & Nagle, for Respondent.

SMITH, C.—This suit was brought against the defendant Mary E. Marshall, as administratrix of Samuel J. Marshall, deceased, to quiet the plaintiff's title to the land described in the complaint, against an instrument purporting to be a deed from the plaintiff to Mary Loftis, his wife (the grantor of the deceased), and against the claims of the defendants generally. The other defendants are Margaret Marshall, the only child of the deceased, a minor, and Mary E. Marshall, in her personal capacity. The plaintiff had judgment, from which the defendants appeal. The facts of the case, as alleged in the complaint and as found, are as follows: The deed referred to, of date January 23, 1892, was signed by the plaintiff, then owner of the land in question, by the fraudulent procurement of his wife and her son, George D. Marshall. The plaintiff was at the time in a drunken condition, and wholly incapacitated from attending to business, and was induced to sign the deed by representations made to him by them that it was a letter to one Horrigan, and by the belief to that effect thus engendered. The deed was witnessed by George D. Marshall, and was proved and recorded.

Afterwards, Mrs. Loftis, in consideration of love and affection, made a deed of the land to the deceased, Samuel J. Marshall, also her son, who took with full notice of the fraud. Samuel J. Marshall died September 21, 1894, and his administratrix—who was appointed in October, 1894—took possession of the premises. The sufficiency of the evidence to support the findings is not disputed.

The defendants, besides other matters, pleaded, in bar of the action, the judgment in a former suit brought by the plaintiff against Mary Loftis, Mary E. Marshall, and Michael Maloney to recover the possession of the land now in question, and on the trial the judgment roll was offered in evidence, but, on objection being made to it, excluded, and this ruling, it is contended, was erroneous. This contention presents the principal question in the case.

The position of the appellants in this regard is, that, under the allegations of the complaint, the plaintiff's deed to his wife was not merely voidable, but void, and hence that the plaintiff's action is based upon and puts in issue the legal title, thus presenting the same issue as in the former case. This contention is perhaps correct, in so far as it assumes that upon the facts alleged in the complaint the deed in question was wholly void. (*Hartshorn v. Day*, 19 How. 223; 1 Story's Equity Jurisprudence, sec. 60; Newell on Ejectment, 649; Bump's Kerr on Fraud and Mistake, 48; Devlin on Deeds, sec. 228.) But assuming this to be the case, we are nevertheless of the opinion that the judgment could not operate as an estoppel against the plaintiff, and that the roll was rightly excluded.

This is sufficiently obvious with regard to the defendant Mary E. Marshall, in her personal capacity. As to her, all that was adjudicated in the ejectment suit was, that the plaintiff should take nothing by his action, and all that was necessarily included in the judgment, or necessary thereto, was the fact, which is admitted, that she was not in possession. Whether the plaintiff was seised or not could therefore make no difference in the result. The question of title, so far as she was concerned, was not involved. (Code Civ. Proc., secs. 1908, 1909; Freeman on Judgments secs. 256 et seq.)

It is claimed, however, that the judgment in favor of Maloney inured to the benefit of the administratrix, the ground of the contention being that he was in possession as

her tenant, and that he was represented in the action by an attorney employed by her, but not otherwise; though it is not claimed that she appeared openly in the case, or that the plaintiff knew of her participation in the defense.

The authorities cited in support of this position are *Valentine v. Mahoney*, 37 Cal. 389; *Russell v. Mallon*, 38 Cal. 259, and *McCreery v. Everding*, 54 Cal. 168. These cases—all of which were anterior to the codes—did not turn upon the general law of estoppel, but, as explained in the case first cited, on certain peculiar features of our own law. It had previously been established that, under the Practice Act, the landlord was not a proper party to a suit in ejectment, which could be brought only against the tenant. The inconvenience of this practice was recognized, but it was deemed too firmly established to be disturbed. But, out of “regard to the position and rights of the landlord,...it [had been] held that when the tenant has notified the landlord of the pendency of the action, and has permitted him to appear and defend in the tenant’s name, the tenant cannot interfere with any subsequent proceedings to the prejudice of the landlord.” (*Valentine v. Mahoney*, 37 Cal. 393, 394.) It was concluded, therefore, that the landlord thus intervening in the action became the real party, his position being “similar to that of the holder of a non-negotiable chose in action who sues in the name of the legal holder, but for his own use (*Valentine v. Mahoney*, 37 Cal. 395); or, it might have been said (to use an older illustration), similar to that of the plaintiff’s lessor or that of the tenant in possession, in the old action of ejectment. (2 Phillipps on Evidence, 11.) But the decision is to be understood as applying only to cases where the landlord has appeared openly in the case, and been permitted by the court to undertake the defense; for in no other way could he obtain control of the case and become party thereto. For though “the landlord may appear and defend in his [the tenant’s] name, or be substituted in his place,” it is said “such appearance or substitution should be entered of record, and only allowed upon notice to the parties”; and “after it is once properly made, the tenant cannot interfere with any subsequent proceedings to the prejudice of his landlord.” (*Dutton v. Warschauer*, 21 Cal. 619.¹) Accordingly, in the concurring opinion in *Valentine v. Mahoney*, 37 Cal. 393, the decision is limited to

¹ 82 Am. Dec. 765.

such cases, and it is said: "It would be dangerous to extend the rule to cases where there is nothing in the record of the action tending to show that the landlord took the defense of the action upon himself. The parties to be estopped," it is added, "ought to be indicated by the record itself" (p. 399). In such cases, the landlord becomes in fact a party to the action, and thus the case comes within the provisions of section 1908 of the Code of Civil Procedure; but neither those provisions nor the cases cited can have any application to a case like the present, where the landlord was in no sense a party to the former suit. There was no error, therefore, in the exclusion of the record. Nor is the objection well taken that there was no finding on the issue of estoppel. The court, in effect, found that there was no estoppel; but had it failed to do so, there would have been no error. When the record was excluded, there was no evidence on the point before the court, and in fact the plea of estoppel presented the same defects as the evidence offered to support it, and was itself insufficient.

The court did not err in overruling the demurrer of the defendants. It is alleged that the plaintiff, "in pursuance of the . . . conspiracy and the . . . fraudulent and deceitful acts of . . . Mary Loftis and George D. Marshall, was kept in ignorance of the . . . grant (or deed) until the . . . day of October, 1894." This, we think, was a sufficient allegation of the discovery of the fraud within three years before the commencement of the action. It was unnecessary to allege ignorance of the subsequent deed from Mrs. Loftis to Samuel J. Marshall, or ignorance of the recording. Nor do we think the allegation was material. On the theory of the appellants—which we have assumed to be correct—the deed was void, and the plaintiff, except as against an adverse possession of five years, could maintain his action at any time.

We advise that the judgment be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 1936. Department One.—October 26, 1901.]

J. H. BELSER, Respondent, v. JOHN ALLMAN, Appellant.

ACTION UPON STREET-ASSESSMENT—SUFFICIENCY OF COMPLAINT—GENERAL DEMURRER—GROUNDS OF SPECIAL DEMURRER—OBJECTION UPON APPEAL.—In an action upon a street-assessment, where the complaint states a cause of action sufficient to support the judgment, a general demurrer thereto was properly overruled; and grounds of special demurrer not urged in the trial court, relating to the manner in which the facts are stated, cannot be urged upon appeal from the judgment.

ID.—PRIMA FACIE CASE—BURDEN OF PROOF.—Under a complaint sufficient to sustain a judgment for the enforcement of the lien of the assessment, a *prima facie* case for a recovery by the plaintiff is made by the production, at the trial, of the assessment, with the documents connected therewith, and of the affidavit of demand and non-payment; and the burden is upon the defendant to allege and affirmatively prove any error, defect, or irregularity that may have supervened in the proceedings subsequent to the ordering of the work.

ID.—DESCRIPTION OF WORK—CONSTITUTIONALITY OF LAW—CASES AFFIRMED.—Held, upon the authority of *Haughwout v. Hubbard*, 131 Cal. 675, that the work contracted for in this case, and for which the assessment was made, was sufficiently described in the resolution of intention, and, upon the authority of *Hadley v. Dague*, 130 Cal. 207, that the Street-improvement Act is constitutional and valid.

ID.—NOTICE FOR SEALED PROPOSALS—FIXING OF TIME BY CLERK—ABSENCE OF ORDER OF COUNCIL—PRESUMPTIONS.—The fact that the clerk fixed the time in the notice calling for sealed proposals, which was posted and published, and that the city council made no order fixing such time, does not vitiate the notice, conceding it to be unauthorized, where it does not appear that the limitation so fixed prevented any one from presenting a proposal. Such prevention is not to be presumed; and if the limitation made by the clerk was unauthorized, all persons must be assumed to have known that fact.

ID.—FICTITIOUS NAMES—DISMISSAL—FINDING—FAILURE TO AMEND COMPLAINT.—Where the action was dismissed as to defendants sued by fictitious names, and the court found that the appellant was at all times the owner of the land, the appellant is not prejudiced by the failure of the plaintiff to file a formal amendment of the complaint striking out the fictitious names.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The following is the portion of the resolution of intention specifically objected to by the appellant as giving too much delegation of power to the street superintendent, in the description of the work: "Under so much of said sewer as is to be constructed of brick and concrete *wherever* the natural foundation is *soft, spongy, or springy*, such natural foundation shall be removed *down to a FIRM and SOLID NATURAL foundation*, and instead of the removed material there shall be placed and constructed a *firm and durable* foundation of *broken rock and concrete so as to permanently* support and carry said sewer and sewer-construction without *sinking, cracking, or injury* thereto." The emphatic words are given as emphasized in appellant's brief. Further facts are stated in the opinion of the court.

R. M. F. Soto, for Appellant.

J. C. Bates, for Respondent.

HARRISON, J.—Action upon a street-assessment.

The defendant filed a general demurrer to the complaint, which was overruled, and he thereupon answered. Trial was had by the court, and judgment rendered in favor of the plaintiff. The defendant has appealed directly from the judgment, bringing the appeal here upon the judgment roll, without any bill of exceptions.

The complaint states a cause of action sufficient to support the judgment against the defendant. The objections thereto urged by him relate to the manner in which the facts are stated, and should have been pointed out by special demurrer. (*Hughes v. Alsip*, 112 Cal. 587.) Instead thereof, when the demurrer came on for argument, there was no appearance in its support, and the court very properly overruled it.

Under the authority of *Haughawout v. Hubbard*, 131 Cal. 675, it must be held that the work contracted for, and for which the assessment was made, is sufficiently described in the resolution of intention. The constitutionality of the Street-improvement Act was affirmed in *Hadley v. Dague*, 130 Cal. 207. (See also *Frenah v. Barber Asphalt Paving Co.*, 181 U. S. 324.)

It may be regarded as a settled rule of practice, under the decisions of this court, that, if a cause of action for the enforcement of the lien of a street-assessment is sufficiently

stated in the complaint, the production, at the trial, of the assessment, with the documents connected therewith, and the affidavit of demand and non-payment, is, in the language of the statute itself, "*prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based," and, in the absence of any other evidence, gives to the plaintiff a right of recovery. (*California Improvement Co. v. Reynolds*, 123 Cal. 88; *Hadley v. Dague*, 130 Cal. 207.) If, notwithstanding such complaint, the defendant would rely upon any error, defect, or irregularity that may have supervened in the proceedings subsequent to the ordering of the work, the burden is upon him, not only to allege such defect, but also to show the same by affirmative evidence.

Section 5 of the Street-improvement Act provides: "Before the awarding of any contract by the city council for doing any work authorized by this act, the city council shall cause notice, with specifications, to be posted conspicuously for five days on or near the council chamber door of said council, inviting sealed proposals or bids for doing the work ordered, and shall also cause notice of said work, inviting sealed proposals, and referring to the specifications posted or on file, to be published for two days in a daily, semi-weekly, or weekly newspaper published and circulated in said city, designated by the council for that purpose." An allegation of facts showing a compliance with this requirement is contained in the complaint herein, and this averment is denied in the answer. The court finds that the allegation of the complaint is true as thus alleged, and also sets forth at length in its finding the order of the council directing the clerk to post the notice. In the notice posted by him, the clerk stated "that such sealed proposals would be received until the tenth day of September, 1890, at 5 o'clock, P. M." It is urged by the appellant that it was the duty of the city council to fix the time within which the proposals should be presented, and that as that body did not fix a date therefor, the clerk was not authorized to do so, and that for this reason there was no proper notice inviting proposals to do the work. The statute does not itself direct the council to fix the time within which proposals may be presented, but declares that "it shall cause notice" to be posted for five days, inviting said

proposals, and shall also cause notice thereof—i. e., of the posting of said notice—to be published for two days. Neither the form of the notice nor the person by whom it is to be given is prescribed in the statute, but it is declared therein that “said proposals or bids shall be delivered to the clerk of the said city council, and said council shall in open session examine and publicly declare the same.” So far as our observation has extended, it has always been the custom of the council to direct notice to be given by the clerk, and for that officer to fix the date for the presentation of proposals. If it should be conceded, however, that his act in this respect was without authority, it would not follow that the notice was thereby vitiated. The unauthorized portion of the notice would be disregarded, and the notice which was authorized by the city council be alone considered. Whether a proposal delivered to the clerk after the date limited in the notice could be disregarded by the council, is a question which does not arise in the present case. It is not to be presumed, in the absence of any showing therefor, that the limitation of time in the notice prevented any one from presenting a proposal, inasmuch as if such limitation of time was unauthorized, all persons must be assumed to have known this fact.

The failure to amend the complaint by striking therefrom the names of the fictitious persons cannot in any respect prejudice the appellant. The recital in the judgment that the defendants sued by fictitious names were dismissed from the action, together with the finding of the court that the appellant was at all times “the owner” of the lot of land described in the complaint, sufficiently protect all rights of the appellant without a formal amendment of the complaint in this particular.

The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 1856. Department One.—October 26, 1901.]

JULIA C. ROWE, Administratrix, etc., Appellant, v.
HIBERNIA SAVINGS AND LOAN SOCIETY, Re-
spondent.

HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION—BURDEN OF PROOF.—All property acquired after marriage by either husband or wife, not included in the statutory exceptions, is presumed to be community property, and whether it has undergone changed conditions or not, the burden of proof is upon the party claiming it to be separate property, to establish that fact by clear and convincing evidence, and the separate property must be clearly traced and located, by plain and connected channels, and not by way of surmises and probabilities.

ID.—CONSTRUCTION OF CODE—POWER OF MARRIED WOMEN—RULE AS TO COMMUNITY PROPERTY NOT AFFECTED.—Section 575 of the Civil Code, providing that "married women and minors may, in their own right, make and draw deposits and draw dividends, and give valid receipts therefor," does not repeal or abrogate or in any way affect the rule established by section 164 of the Civil Code, concerning the community property of the husband and wife.

ID.—REPEAL BY IMPLICATION.—The repeal of a law by implication is not favored; and it requires language of unmistakable meaning, or a direct statutory enactment to accomplish a repeal.

ID.—DEPOSIT IN BANK BY WIFE—ACTION BY ADMINISTRATRIX AGAINST BANK—EVIDENCE—FORMER JUDGMENT IN FAVOR OF HUSBAND—ERROR WITHOUT PREJUDICE.—In an action by the administratrix of the deceased wife to recover a deposit made in a bank in the name of the wife, evidence of a former judgment against the bank, in favor of the husband, is not admissible; but where the evidence is full as to the history of the account kept by the deceased wife, and sustains the findings that the money left in the bank was community property, the plaintiff could not be prejudiced by the admission of such judgment in evidence.

ID.—WILL OF WIFE NOT ADMISSIBLE EVIDENCE.—The will of the deceased wife, disposing of the amount deposited in bank, together with other property, is not admissible in evidence against the defendant. Declarations in her will, made without the knowledge of her husband, were not competent proof that the property was her separate property.

ID.—TESTIMONY OF HUSBAND—IMPEACHMENT—REBUTTAL.—Where the husband testified for the defendant that he did not know until after his wife's death that she had a bank account, testimony in rebuttal, relative to a statement made by him on the morning after her death, that she kept her own bank account, is not admissible as impeaching testimony, where no foundation was laid therefor, and plaintiff could not be prejudiced by a ruling excluding the evidence as rebuttal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Edward A. Belcher, Judge.

The facts are stated in the opinion.

T. Z. Blakeman, for Appellant.

Tobin & Tobin, for Respondent.

CHIPMAN, C.—Action for the recovery of money alleged to have been on deposit with defendant, belonging to plaintiff's testate at her death. Defendant had judgment, from which and from the order denying motion for new trial plaintiff appeals. The court found the following facts: That decedent intermarried with John Nicholson, November 22, 1877, and they lived together as man and wife until her death, May 20, 1894; decedent's name at the marriage was Hannah Lane (she being then the widow of one Michael Lane), and at that time,—to wit, November 22, 1877—she had on deposit with defendant the sum of \$796.70, which remained on deposit subsequent to her marriage, and together with accrued interest amounted on April 30, 1884, to \$1,100.05, which last-named sum was her separate property; that she continued to make deposits after said marriage, in the name of Hannah Lane, which were, at her request, entered in her pass-book used prior to her marriage with Nicholson; and the court found that such deposits after marriage “were the community property and earnings of the said decedent and her said husband”; that on April 30, 1884, aforesaid, decedent “withdrew from the sums deposited by her with defendant society under the name and designation of Hannah Lane, as aforesaid, the sum of \$2,100,” which included the said sum of \$796.70 and its accumulations to the time of marriage, aggregating, as aforesaid, the sum of \$1,100.05 on April 30, 1884; that after said withdrawal of said \$2,100, all sums remaining on deposit or thereafter deposited by decedent in the name of Hannah Lane belonged to the community, being the earnings and savings from the labor and business of her husband, John Nicholson; that all the money deposited by her under the name of Hannah Lane from November 22, 1877, continuously to the date of her death, were community property of decedent and her

said husband, Nicholson, including the money sued for in this action. Judgment was accordingly entered in favor of defendant.

Appellant's contention is, that the findings are not justified by the evidence. This claim is, to some extent at least, dependent upon appellant's further contention, that, under the provisions of section 575 of the Civil Code, money deposited by a married woman to her own account in a savings bank is presumptively her separate property. The section reads: "Married women and minors may, in their own right, make and draw deposits and draw dividends, and give valid receipts therefor." It has been held by this court in many cases, and from an early period, that all property acquired after marriage by either husband or wife, except acquired in certain ways, not applicable to the case here, is presumed to be community property, and the burden is upon the party claiming that it is separate property, to prove it to be such by clear and convincing evidence (*Davis v. Green*, 122 Cal. 364, and cases cited); and if the property has undergone changed conditions, the burden of proof is the same, and the proof must be of the same certain and convincing character (*Dimmick v. Dimmick*, 95 Cal. 323); and it was there said that the property must "be clearly traced and located, . . . not by way of surmises and probabilities, but by plain and connected channels." The recent case of *Fennell v. Drinkhouse*, 131 Cal. 447,¹ was much the same as the one at bar, the difference being in the parties to the action. The same savings society had paid over money, on deposit in the name of Fennell's wife, to the administrator of her estate, and the husband brought the action against the administrator of her estate, alleging that the money received by the defendant was community property. It was there said: "All the money found in the bank, received by the administrator, was deposited after the marriage of plaintiff and Mrs. Fennell, and the presumption therefore was, in the absence of other evidence, that all of it was community property, and the burden of proof was upon appellant." It is true that section 575 of the Civil Code, relied on by appellant, was not cited in that case; but we find nothing in the language of the section warranting us in holding that it repealed section 164 of the Civil Code, or abrogated the rule so long and so firmly settled in this state. It simply provided that married women and minors

¹ 82 Am. St. Rep. 361.

might do certain things in their own right, which ordinarily they would be disqualified from doing, but it does not purport to repeal or change any pre-existing statute, nor does it change the *status* of property deposited by the wife in her own name after marriage. The section does not seem to me even to imply a repeal of section 164 of the Civil Code, and if it did, the rule is, that the repeal of a law by implication is not favored. It would require language of unmistakable meaning, or a direct statutory enactment, to accomplish a repeal. (*Capron v. Hitchcock*, 98 Cal. 427.)

It would subserve no useful purpose to state the evidence. We have given it careful consideration, and are of the opinion that plaintiff failed to show by clear and convincing evidence that the money now claimed was the separate property of decedent at her death, or at any time during her marriage with Nicholson. The evidence showed that she had separate property when she married him, but we think there was evidence to support the finding of the court as to what became of it, and as to the character of her subsequent deposits.

2. The court admitted in evidence for defendant the judgment roll in an action brought by Nicholson against this defendant (which was an action to recover the same money here involved), in which Nicholson had judgment. Plaintiff objected to the evidence as irrelevant and immaterial, and now urges the ruling as error. We cannot see that this evidence was at all material under the issues. Plaintiff was not a party to that suit, and judgment in it settled no right of plaintiff to the money. Respondent states that the only purpose of the evidence was to show diligence on its part, and was offered for that specific purpose, as the record shows, and not to establish the character of the fund. We fail to see why respondent was called upon to show diligence. There was no obligation resting upon it to move in the matter until the money was demanded, and diligence in answering Nicholson's suit had no bearing on plaintiff's suit subsequently brought. The evidence, however, was full as to the history of the account kept by decedent with the savings society, and as to the character of the money in question. In no phase of the case can we see that this judgment roll could have prejudiced plaintiff, or that it had the slightest influence with the court.

3. Plaintiff offered in evidence the will of Mrs. Nicholson,

made in 1894, in which she disposed of certain real property, and the money standing to her credit with defendant. On defendant's objection, the evidence was refused. The ruling was not error. Declarations made in the will, and without the knowledge of her husband, were not admissible to prove that the property was separate.

4. Witness Nicholson testified for defendant that he did not know until after his wife's death that she had a bank account. Plaintiff called a witness in rebuttal, who was asked if Nicholson did not, on the morning after Mrs. Nicholson's death, say to witness that his wife was a peculiar woman; that she collected her own rents, paid her taxes, and kept her own bank account. Defendant objected, on the ground of immateriality, and that it was not proper rebuttal, and not competent to contradict or impeach Nicholson. As impeaching evidence there was no foundation laid for it, and as rebutting Nicholson's statement it would have added nothing, for he stated that he did not know of the bank account until after his wife died. Plaintiff could not have been prejudiced by the ruling; if the question had been answered as expected by counsel, the answer would have been what Nicholson already had testified to.

We discover no error in the record, and advise that the judgment and order be affirmed.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1882. Department One.—October 26, 1901.]

CHARLES ASHTON and JULIUS JACOBS, Executors,
etc., Respondents, v. THE ZEILA MINING COM-
PANY, Appellant.

CORPORATIONS—TRANSFER OF STOCK—DECREE OF DISTRIBUTION—APPEAL—REVERSAL—ACTION BY EXECUTOR TO RECOVER DIVIDENDS.—The transfer of stock in a corporation to a distributee, which derives its efficacy solely from the decree of distribution, is suspended as to its efficacy, and as to the power of further transfer thereof, by an appeal from the decree, and upon reversal thereof the executor is entitled to the stock, and may maintain an action against the corporation to recover dividends thereon, though he does not appear to be owner on the books of the company.

ID.—TRANSFER OF STOCK BY INDORSEMENT AND DELIVERY—RULE OF CORPORATION—PROTECTION AS TO DIVIDENDS.—In this state, title to stock passes, as between the parties, by indorsement and delivery; and any rule of a corporation requiring the stock to be transferred upon the books goes no further than to protect the corporation in paying dividends to a recorded stockholder, in the absence of notice of transfer or other right.

ID.—TITLE OF EXECUTORS—IMPROPER TRANSFER ON BOOKS.—The corporation could not take advantage of its own wrong in transferring the stock on the books from the distributee of the stock, pending an appeal from the decree of distribution, nor can the assignees derive any rights thereunder, and the title of the executor, upon reversal of the decree, revived, and if not a strict legal title, was, in its legal consequences, equivalent thereto.

ID.—PARTIES TO ACTION FOR DIVIDENDS—ASSIGNEES OF STOCK—WAIVER OF OBJECTION—REPRESENTATION BY ATTORNEYS.—It seems that the assignees of the stock should have been made parties to the action by the executors to recover the dividends, but objection on that ground is waived if not taken by demurrer or answer. Where the assignees were represented by the same attorneys who represented them in a former action to recover the stock, and might have intervened in this action, they cannot be prejudiced by the omission to make them parties.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Knight & Heggerty, and George D. Collins, for Appellant.

Evans & Meredith, and Lester H. Jacobs, for Respondents.

SMITH, C.—This suit was brought to recover the amount of dividends on certain shares of the capital stock of the defendant, being the same shares of stock for which the plaintiffs afterwards recovered in the judgment affirmed in *Ashton v. Heggerty*, 130 Cal. 516. The plaintiffs recovered judgment, from which and from the order denying a new trial the defendant appeals.

The stock in question belonged originally to the estate of Heydenfeldt, the plaintiffs' testator, and in pursuance of a decree of distribution of date October 23, 1893, the certificates therefor, indorsed by the executors, were delivered by them to Elizabeth A. Heydenfeldt, widow of the testator, to whom they had been distributed. But an appeal was taken from this decree, which resulted in its reversal, March 15, 1895. (*Estate of Heydenfeldt*, 106 Cal. 434.) Meanwhile, January 18, 1894, pending the appeal, the stock was transferred on the books of the defendant to Mrs. Heydenfeldt, and again, April 14, 1894 (upon her assignment), to Sunshine O. Heydenfeldt, the corresponding certificates being issued. Afterwards, one share was assigned and transferred on the books of the defendant to Heggerty. This assignment and the assignment to Sunshine Heydenfeldt, who was a party to the administration proceedings, were without consideration, and the transfers, it is alleged and found, were made by the defendant, with notice of the pendency of the appeal and of the rights of the estate. The defendant was also served, after the reversal of the decree, with a written notice of the claims of the plaintiffs to the stock, and of the dividends accrued and to accrue thereon. The dividends in question (six in number) were thereafter declared, and were paid, with the exception of one, to Sunshine Heydenfeldt, in pursuance of a judgment in an action to which the plaintiffs were not parties.

The question of the plaintiffs' right to the stock was disposed of in the former decision. (*Ashton v. Heggerty*, 130 Cal. 516.) The remaining points made by the appellants are,—1. That, on the facts found, the plaintiffs were not entitled to recover; 2. That the finding as to demand on the defendant is not sustained by the evidence; and 3. That the court failed to find on the affirmative defense set up in the answer.

The last two points may be briefly disposed of. The allegations contained in the affirmative defense set up no new

matter, and are fully covered by the findings. The objection to the sufficiency of the evidence to justify the finding as to demand is based upon a supposed variance between the facts alleged and found, and the evidence. The actual dividends were declared June 20, July 20, August 22, September 20, October 17, and December 21, 1895, and were for ten cents per share each; the dividends referred to in the complaint and findings are described in precisely the same terms, except, as to the first five, that the year is given as "1894," instead of "1895." But this is obviously a mere clerical error, as is shown by the preceding allegations of the complaint and findings, which describe the dividends intended as made after the reversal of the decree ("March 15, 1895"), and after the date of the written notice referred to ("the 20th of June, 1895"). Nor was it shown or claimed that dividends were declared in 1894, or that any dividends, other than the six, were declared in 1895.

The remaining point, more specifically stated, is, that the plaintiffs' title, as shown by the complaint and findings, is insufficient to maintain the action. This position is based by the counsel of appellant on two grounds, essentially different; namely, that the action can be maintained only by the party appearing to be the owner on the books of the company, and that it cannot be maintained on a merely equitable title, such as it is claimed is the plaintiffs'.

The former proposition cannot be sustained, at least not in this state, where, by express provision of the law, stock is transferred, "as to the parties thereto," by simple indorsement and delivery. (Civ. Code, secs. 324, 1459.) The rule is different where, by express provisions of the law, stock is made "transferable only on the books of [the] company," etc. (*Northrop v. Newton and Bridgeport Turnpike Co.*, 3 Conn. 544; 1 Morawetz on Corporations, sec. 170,—cited by appellant's counsel); and possibly, as is said by the author last cited, the same rule may apply—in the absence of express statutory provisions such as ours—to cases where it is so provided in the articles of incorporation or by-laws. But, ordinarily, the rule goes no further than to protect the corporation "in paying dividends to a recorded stockholder," in the absence of notice of transfer or other right. (2 Cook on Corporations, sec. 538; 2 Thompson on Corporations,

secs. 2180, 2387,—cited by appellant. See also *Ellis v. Proprietors of Essex Merrimack Bridge*, 19 Mass. 243; *Robinson v. National Bank*, 95 N. Y. 637, 642; *Hill v. Atoka Coal & Min. Co.*, 21 S. W. Rep. 508; *Spreckels v. Nevada Bank*, 113 Cal. 272, 276.¹)

Nor do we think tenable the proposition that the action cannot be maintained on such a title as the plaintiffs'. The transfer of the stock to Mrs. Heydenfeldt derived its whole efficacy from the decree of distribution; and when the decree was reversed, "the matter stood as though no decree had been made." (*Ashton v. Heydenfeldt*, 124 Cal. 17.) In the meanwhile the efficacy of the decree, and of the indorsement and delivery of the stock made in pursuance thereof, was suspended, and the defendant was not authorized to make the transfer on the books to Mrs. Heydenfeldt, or the other transfers. Nor can the defendant derive advantage from its wrongful act in doing so (1 Morawetz on Corporations, secs. 181 et seq.); nor can the assignees derive any rights therefrom, or by reason of their assignments, other than those of Mrs. Heydenfeldt. The case stands, therefore, in principle, as though the transfers on the books of the defendant had not been made, and Mrs. Heydenfeldt remained the only party involved; and on the reversal of the decree of distribution, her interest, or at least her beneficial interest, and that of her assignees ceased, and the rights of the executors, if previously suspended, revived. (*Ashton v. Heydenfeldt*, 124 Cal. 14.) Thereupon—as was ruled in the case cited—the executors were entitled to recover the stock; which was, in effect, to hold that the title of the executors, if not the complete legal title, was, in its legal consequences, equivalent to it. The case must therefore be regarded as coming within the authority of that decision.

In reaching this conclusion we have not thought it necessary to consider the supposed distinction between the legal and the equitable title, or to determine whether the title of the executors is the one or the other. The distinction belongs appropriately to the law of real estate; and though it has been extended to personalty, the application with regard thereto has been less extensive, and the distinction itself is less significant. For, in many cases,—as, for example, in the case of money received in trust or for the use of another,—

¹ 54 Am. St. Rep. 348.

courts of law recognize the equitable as the legal title; and even where the distinction obtains, the equitable is regarded as the true owner by courts of equity. Hence, in this state, where the courts exercise both jurisdictions, the question as to the nature of the title sued upon is generally immaterial; or, rather, it is material only to the question of the nature of the action, whether legal or equitable, and to the question of parties.

With regard to the latter question, the assignees should perhaps have been made parties, as they were in the suit of *Ashton v. Heggerty*, 130 Cal. 516, which was brought for the recovery of the stock. But no objection on this score was made, either by demurrer or answer, and the objection must therefore be regarded as waived. (Code Civ. Proc., sec. 434.) Nor were the assignees in any way injured, as they were parties to the other suit, and are represented in this by the same attorneys, and could have intervened if they desired.

We advise that the judgment and order appealed from be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1873. Department One.—October 26, 1901.]

SAN FRANCISCO AND SAN JOAQUIN VALLEY RAILWAY COMPANY, Respondent, v. GEORGE LEVISTON, Appellant.

EMINENT DOMAIN—ACTION TO CONDEMN LAND FOR RAILROAD—PLEADING—CONSTRUCTION OF CODE.—A railroad company organized to construct and operate a steam-railroad to carry passengers and freight for hire is a common carrier and is authorized by the Code of Civil Procedure to condemn land for its use; and it need not aver in its complaint that it was organized for "public transportation," as mentioned in subdivision 4 of section 1238 of the Code of Civil Procedure. The clause in which those words occur was intended to qualify only the words, "canals, ditches," and has no application to railroads.

ID.—LOCATION, GENERAL ROUTE, AND TERMINI OF ROAD—CERTAINTY.—

A complaint showing an incorporation for the purpose of constructing a railroad, "commencing at the city and county of San Francisco," and "running in a general easterly direction to Stockton, and thence in a general easterly and southerly direction to a point in the vicinity of Bakersfield," shows the location, general route, and termini of the road with sufficient certainty.

ID.—FINDINGS—ADMISSIONS—EVIDENCE—ERROR WITHOUT PREJUDICE.—

Where the court, in the action to condemn land, found that all of the allegations of the complaint were true, and the findings of the court and verdict covered all of the issues, and were sustained by the evidence, an erroneous finding, that certain allegations of the complaint were admitted by the defendant in open court, is not prejudicial to the defendant.

ID.—INTEREST—COSTS—CONDITION OF CONDEMNATION.—The code does not provide for interest on the verdict; and does not require the payment of costs as a condition of the final order of condemnation. The only condition imposed is the payment of the sum of money assessed, within thirty days after final judgment, and that excludes any other condition.

APPEALS from a judgment and final order of condemnation of land in the Superior Court of Contra Costa County. Joseph P. Jones, Judge.

The facts are stated in the opinion.

Riordan & Lande, and William Leviston, for Appellant.

E. F. Preston, and William S. Wells, for Respondent.

SMITH, C.—Appeals from judgment and final order of condemnation in suit to condemn defendant's land.

The complaint was demurred to generally, and on the special grounds (among others) that it is ambiguous, unintelligible, and uncertain in its allegations as to the location, general route, and termini of the plaintiff's road, and, also, that it does not appear from its allegations that the use for which the property is required is a public use.

With regard to the latter point, the allegation of the complaint is, in effect, that the plaintiff was incorporated for the purpose of constructing and operating a steam-railroad "for the carrying of passengers and freight . . . for hire," etc.; and the specific point is, that this does not show that it was for "*public transportation*," as mentioned in sub-

division 4 of section 1238 of the Code of Civil Procedure. But the clause in which the quoted expression occurs is, we think, intended to qualify only the words, "canals, ditches," etc., and has no application to the preceding words. The construction is sufficiently clear from the nature of the qualifying clause; but it is also required by the provisions of the Civil Code, which impose on all railroad corporations the duties of common carriers, and confer upon them the right of acquiring lands, etc., under the provisions of the Code of Civil Procedure. (Civ. Code, secs. 481, 465, subd. 7.)

The other objection to the complaint is equally untenable. The allegations as to "the location, general route, and termini" of the plaintiff's road (Code Civ. Proc., sec. 1244, subd. 4) are, that the plaintiff was incorporated for the purpose of constructing a railroad, "commencing at the city and county of San Francisco, . . . and running in a general easterly direction to Stockton, . . . and thence in a general easterly and southerly direction to a point in the vicinity of Bakersfield; . . . that the location and general route of said railroad are from a point in the city and county of San Francisco, . . . or some point on the bay of San Francisco, or the waters discharging into it, in a general easterly direction to the said city of Stockton, and from said city . . . in an easterly and southerly direction to a point in the county of Kern, in the vicinity of the city of Bakersfield; and the termini of said railroad are respectively the city and county of San Francisco and the said point in the vicinity of said city of Bakersfield." The termini specified are the same as those given in the statement of the purpose of the plaintiff's incorporation, and are sufficiently alleged. (*California Southern R. R. Co. v. Southern Pacific R. R. Co.*, 67 Cal. 61; *Pasadena v. Stimson*, 91 Cal. 252.) Nor is there anything inconsistent with the alleged termini in the allegations of the complaint as to "the location and general route" of the road. These refer to the point of commencement of the location or course located, which, in the case of any road running easterly from San Francisco, as one of its termini, must necessarily be on the easterly shore of the bay, or on some of the waters discharging into it, and at a point on the general easterly course to Stockton mentioned. The point is not very exactly determined, nor is it necessary that it

should be. It is not a terminus of the road, but merely the commencement of its location, or course as located.

Another point urged is, that the court failed to find on certain issues raised by the complaint and answer. This is not exactly the case; for the court in fact finds that all the allegations of the complaint are true. But it is recited in the judgment that certain allegations (being all other than those covered by the verdict) were admitted by defendant in open court, and it appears from the bill of exceptions that this, in fact, was not the case. But it also appears from the bill that on some of these issues evidence was given, not only sufficient to justify the findings, but conclusively so; and with reference to these the error of the court in supposing the allegations to be admitted was in no way prejudicial to the defendant. The verdict of the jury determined the ownership of the lands affected by the suit, the value of the land condemned, and the damages accruing to the remaining land of the defendant, and the cost of fencing and cattle-guards,—thus disposing of all the matters provided for in section 1248 of the Code of Civil Procedure, that were involved. The remaining issues, or rather those to which the objections urged by the appellant refer, relate to the location of the road, to the necessity of the right of way, and to the compatibility of the location with the greatest public good or the least private injury. As to the location of the road through the land of the defendant, that was definitely shown by the description given in the complaint,—which is not questioned,—and by the verdict, and also by the testimony of the plaintiff's engineer, and the maps put in evidence; and there was no conflicting evidence. As to the location elsewhere, or the location and general course, there was no denial in the answer, except as to the termini, which were proved by the plaintiff's engineer, who testified, also, as to the definite location of the road from Port Richmond (on the bay) to Giant's Station, a point beyond the defendant's land. As to the necessity of the right of way, the existence of the public use and the location through the defendant's land establish the necessity. (Civ. Code, sec. 465, subds. 1, 4, 7; *Pasadena v. Stimson*, 91 Cal. 253.) With regard to the compatibility of the location of plaintiff's road with the greatest public good and least private injury, there was no issue.

The defendant indeed denies such compatibility, but there was no allegation on the point in the complaint, nor was any required (Code Civ. Proc., sec. 1244); nor was there any evidence. (*Pasadena v. Stimson*, 91 Cal. 255, 257.)

The remaining objections urged by the appellant are, that the judgment did not allow interest on the amount found by the jury, or require the payment of the costs as a condition of the final order of condemnation. It would doubtless be a reasonable provision to require the payment of costs as a condition of condemnation. But we find no provision of the code requiring this condition to be imposed. Nor is there any provision requiring interest to be allowed from the date of the verdict. The only condition imposed is the payment of "the sum of money assessed," "within thirty days after final judgment," and that "when payments have been made," etc., a final order of condemnation shall be rendered (Code Civ. Proc., secs. 1251, 1253), which seems to exclude the idea of any other condition than the one specified being proper.

I advise that the judgment and order appealed from—the former entitled "Preliminary order of condemnation" and the latter "Final order of condemnation"—be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from—the former entitled "Preliminary order of condemnation" and the latter "Final order of condemnation"—are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[Sac. No. 1857. Department One.—October 26, 1901.]

E. C. LYLES, Respondent, v. E. B. PERRIN, Appellant.

DEED OF GRANT—PREVIOUS CONVEYANCE OF WATER RIGHT—BREACH OF IMPLIED COVENANT—DAMAGES.—A deed of grant, expressly granting a water right as an appurtenance to the land conveyed, implies a covenant against a previous conveyance thereof; and where such water right was appurtenant to the land, when the negotiations for purchase thereof were begun by the grantee, and was conveyed to a third person, prior to such deed of grant, the purchaser is entitled to recover from his grantor the value of the water right, as damages for the breach of such implied covenant.

ID.—PLEADING—EVIDENCE OF DEED—IMMATERIAL VARIANCE—DEFECT SUPPLIED BY ANSWER.—A variance between the complaint and the evidence, as to the deed, is immaterial, if it could not have prejudiced the defendant. Where it appears that the defect in the complaint was supplied by the express allegations of the answer, and that the defendant offered the deed in evidence, he could not be prejudiced by its admission.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion.

M. K. Harris, for Appellant.

Harris & Hubbard, for Respondent.

SMITH, C.—The plaintiff recovered judgment for the sum of five hundred dollars, the value of a water right appurtenant to land purchased by him from the defendant, and conveyed away by the latter before the execution of the deed. The defendant appeals from the judgment and from the order denying his motion for a new trial.

The contract for the purchase of the land was made between the plaintiff and defendant, May 8, 1894, at which time the water right in question was appurtenant to and part of the land purchased. The form of the contract was an escrow deed to one Bryan, son-in-law of the plaintiff, and an accompanying agreement signed by the defendant, acknowledging the receipt of twelve hundred dollars from Bryan, and directing the delivery of the deed to him upon the payment of the balance of the purchase money; but, as

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understood by both parties, Bryan was merely a nominal party, and the deed and agreement were taken in his name for the convenience and for the use of the plaintiff. The escrow deed was afterwards destroyed, and, October 16, 1894, the defendant executed to the plaintiff a deed purporting, for the consideration therein named, to grant, bargain, sell, and convey the land described (which was the same that was originally purchased), "together with the water right thereon." But in the mean while, August 30, 1894, the defendant had conveyed the water right to another. The value of the water right was found by the court to be five hundred dollars,—the sum for which judgment was rendered.

It is contended by the appellant that all previous transactions and agreements were merged in the deed finally executed, and that its effect could not be altered by evidence of such transactions or by parol evidence. But, without admitting this contention, it will be sufficient to say that the deed itself grants, expressly, the water right on the land, and that this is clearly identified by the circumstances shown as the right that was appurtenant to the land at the beginning of the negotiations. The case presented is, therefore, simply, that of a previous conveyance of part of the estate the deed purported to grant, which was in contravention of the covenant implied in his deed. (Civ. Code, sec. 1113, subd. 1.) The judgment, on the facts proved and found, was therefore clearly right.

It is claimed that the facts alleged do not altogether correspond with the facts found, and that there is indeed no reference in the complaint to this deed. But the variance, if any, could not have been in any way prejudicial to the defendant, and may therefore be disregarded. (Code Civ. Proc., sec. 469.) In fact, it may be added, this defect was supplied by the express allegations in the answer (*Herd v. Tuohy*, 133 Cal. 55), and the deed itself was put in evidence by the defendant.

We advise that the judgment and order appealed from be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1980. Department One.—October 28, 1901.]

ANNE M. TAPPENDORFF, Respondent, v. BARTHOL
MORANDA, Appellant.

EJECTMENT—PLEADING—HOMESTEAD—STATEMENT OF "COST" VALUE.—

In an action of ejectment by a wife to recover the possession of a homestead, of which the husband had made a lease without her signature, where the complaint set forth a copy of the declaration of homestead, attached as an exhibit to the complaint, which purported to state the actual "cost" value of the property, instead of its actual cash value, as required by the statute, such complaint does not state a cause of action, and a demurrer thereto should have been sustained.

ID.—COMPLIANCE WITH HOMESTEAD LAW ESSENTIAL.—The right to a homestead, with the privileges and immunities incident thereto, is of statutory creation, and exists only upon compliance with the requirements of the statute.

ID.—AMENDMENT OF COMPLAINT—SERVICE—IMPROPER JUDGMENT BY DEFAULT.—The amendment of the complaint so as to conform to the declaration of homestead, which in fact stated the actual cash value of the premises, was in matter of substance, and had the effect to set aside a default of the defendant, previously entered, and no judgment by default could be entered upon the amended complaint without proof of service thereof upon the defendant, and a default thereafter occurring. The court erred in rendering judgment against the defendant without proof of such service.

ID.—AMENDMENT WRITTEN IN ORIGINAL COMPLAINT.—The writing of an amendment in the original complaint, so as to change it in matter of substance, makes it none the less an amended complaint, a copy of which must be served upon the defendant.

APPEAL from a judgment of the Superior Court of Humboldt County. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

Gregor & Connick, for Appellant.

S. D. O'Neal, and L. F. Puter, for Respondent.

HARRISON, J.—The plaintiff is the wife of Frederick Tappendorff, and seeks by this action to recover from the defendant the possession of certain real property in the county of Humboldt. In her complaint, after setting forth facts under which a homestead might be declared by her husband, she alleges that on the sixteenth day of May, 1878, her husband executed and acknowledged "a valid declaration

of homestead" upon said premises, and that the same was on said day recorded in the office of the county recorder. A copy of the said declaration is attached to the complaint, and by averment made a part thereof. This copy contained the statement "that the actual *cost* value of said property is three thousand dollars." The plaintiff further alleges that on October 20, 1897, her husband executed to the defendant a lease of said land for the term of five years, under which the defendant entered and took possession thereof; that she did not unite or join with her husband in the execution of the said lease; that she has demanded possession of the said premises from the defendant, and that he has refused to deliver the same, and still withholds them from her. The defendant demurred to the complaint, upon the ground that there was a defect of parties plaintiff, in that her husband should have been joined with her; that the plaintiff has not the capacity to sue, and that the complaint does not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and the defendant failing to answer, his default was entered on the sixth day of April, 1899. Thereafter—April 13th—the plaintiff applied to the court for the relief demanded in her complaint, and upon producing the original declaration of homestead, as recorded in the office of the county recorder, wherein was stated the cash value of the premises, instead of the cost value thereof, the court made an order permitting her to amend her complaint by striking out, in the copy of the declaration of homestead attached thereto, the word "*cost*," in the paragraph above quoted, and inserting therein, in its place, the word "*cash*." This amendment was made without any notice to the defendant, and without his consent, and neither the said amendment, nor a copy of the complaint as amended, was served upon him. Immediately after making the amendment, the plaintiff presented to the court evidence in support of her complaint, and judgment was thereupon rendered in her favor. From this judgment the defendant has appealed, bringing the appeal here upon the judgment roll, including a bill of exceptions.

The validity of the declaration of homestead which was annexed to the original complaint is to be determined by a consideration of its terms, and not according to the opinion of the pleader. If the complaint had alleged that on May 16, 1878, the husband of the plaintiff executed and acknowl-

edged the following instrument (setting forth the declaration of homestead), and filed the same in the recorder's office, and that the same is a "valid" declaration of homestead, such statement would not prevail over the terms of the instrument itself. Annexing the copy of the declaration of homestead to the complaint, and making it a part thereof, had, however, the same effect as if it had been set forth at length in the body of the complaint. It was essential to the plaintiff's cause of action that her complaint should show that the land sued for was covered by a valid declaration of homestead. Otherwise she could not sue alone, but the right of action would have been in her husband. (Code Civ. Proc., sec. 370.)

The right to a homestead, and to enjoy the privileges and immunities incident thereto, is purely a statutory creation, and exists only upon a compliance with the requirements of the statute. What the statute has specifically prescribed as a requisite for impressing the incidents of a homestead upon a tract of land is mandatory, and cannot be dispensed with. (*Cunha v. Hughes*, 122 Cal. 111;¹ *Reid v. Englehart-Davidson etc. Co.*, 126 Cal. 527.²) One of these requirements is, that it shall contain an estimate of the "actual cash value" of the premises. This requirement is not complied with by stating their "actual cost value." Such a statement, aside from failing to comply with the statute, fails to show at what period of time the cost was incurred, or by what standard it was measured, or to give any *data* from which its present actual value can be determined, and is in fact a failure to state its actual value. In *Ames v. Eldred*, 55 Cal. 136, a declaration which stated that "the actual cash value is five thousand dollars, *and over*," was held invalid.

The copy of the declaration annexed to the complaint, therefore, failed to show that there was a valid homestead upon the land sued for, and the demurrer should have been sustained. It was immaterial that the original declaration of homestead was good, since the complaint was to be judged by itself, and not by the facts upon which the plaintiff might seek to establish her cause of action.

The amendment of the complaint had the effect to set aside the default of the defendant previously entered, and the complaint as amended should then have been served upon him.

¹ 68 Am. St. Rep. 27.

² 77 Am. St. Rep. 206.

(*Thompson v. Johnson*, 60 Cal. 292; *Reinhart v. Lugo*, 86 Cal. 395;¹ *Witter v. Bachman*, 117 Cal. 318.) The amendment to the complaint was in matter of substance, and it was none the less an amended complaint, although the amendment was written into the original. The defendant was entitled to be served with either a copy of the amendment, or of the original complaint as amended, and had the right to answer or demur thereto before a default could be taken against him. It was therefore error for the court to proceed and render judgment against him in the absence of proof that such service had been made.

The judgment is reversed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1918. Department One.—October 28, 1901.]

ERNEST J. COTTON et al., Appellants, v. JOHN B. WATSON et al., Respondents.

STREET-ASSESSMENT—DATE OF WARRANT—RECORD—NOTICE—LIMITATION OF TIME FOR APPEAL.—Under the provisions of the Street-improvement Act, the limitation of "thirty days after the date of the warrant" in which to appeal from the assessment is to be counted from the date of the record of the warrant, and not from its actual date, if different therefrom. The date of the record of the warrant is that from which notice is imputed to those who have the right to appeal.

ID.—DELIVERY AND RETURN OF WARRANT.—The warrant cannot be delivered to the contractor, and has no operative function, until it has been recorded; and it is the intention of the legislature that the time within which an appeal might be taken from the assessment, and within which the warrant should be returned to the superintendent, should be the same,—viz., thirty days from the time when he was entitled to receive the warrant.

ID.—STATUTORY CONSTRUCTION—RIGHTS OF PARTIES—INTENTION OF LEGISLATURE AS TO DATE OF WARRANT.—The Street-improvement Act ought not to be construed as placing it within the power of the superintendent of streets, by failure to record the warrant, essentially to impair or destroy the rights of the parties. The legislature contemplated that the date of the warrant, and the record of the warrant, should be the same.

¹ 21 Am. St. Rep. 52, and note.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

Davis & Hill, and William Lair Hill, for Appellants.

J. C. Bates, for Respondents.

HARRISON, J.—Action upon a street-assessment.

Judgment was rendered in favor of the defendants, and the plaintiffs have appealed, upon the judgment roll, without any bill of exceptions. The only question presented by the appeal is, whether the contractor returned his warrant to the superintendent of streets within the time prescribed by the statute for the preservation of his lien.

Section 10 of the Street-improvement Act provides (Stats. 1885, p. 155) that "the warrant shall be returned to the superintendent of streets within thirty days after its date, with a return indorsed thereon; . . . and if any contractor shall fail to return his warrant within the time and in the form provided in this section, he shall thenceforth have no lien upon the property assessed."

The warrant issued by the superintendent is in words and figures as follows:—

"By virtue hereof, I, M. K. Miller, superintendent of streets of the city of Oakland, county of Alameda, and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize and empower Cotton Bros. & Co., agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be their warrant for the same.

"OAKLAND, December 31st, A. D. 1895.

"M. K. MILLER,

"Superintendent of Streets of the City of Oakland."

The court finds that after the superintendent had made the warrant, "it was retained by the superintendent of streets in his possession until January 6, 1896, on which day it was recorded by him, and the fact and date of recording was written on it and signed by him, and then he delivered it to the plaintiffs"; and that the return on said warrant was sworn to, February 3, 1896, and that said warrant was returned to said superintendent of streets, February 3, 1896,

and not before that time.

Section 9 of the Street-improvement Act (Stats. 1891, p. 205) provides that the warrant shall be signed by the superintendent and attached to the assessment, and that it shall be "substantially" in the form there given. In the form thus prescribed, provision is made for a date to be written at the end of the warrant. In *Shipman v. Forbes*, 97 Cal. 572, it was held that the date is an essential part of the warrant, and that it must contain the month and day of the month, as well as the year. There is nothing in that case, however, tending to show that the month or the day of the month which is written in the warrant is conclusive that that is its actual "date," if such day or month is inconsistent with other dates which appear in the documents or records of which the warrant is a part. The time at which an instrument becomes operative, or has the legal effect for which it is made, is its date. (*Shaughnessey v. Lewis*, 130 Mass. 355.) The date which is written in an instrument is *prima facie* its actual date, but when the rights of a person depend upon or are measured from the date of an instrument, it is competent to show that the date written therein is not its actual date.

It is provided in section 9, aforesaid, that the warrant and other documents by which the lien of the assessment is created shall be recorded in the office of the superintendent of streets, and that "when so recorded" the assessment shall be a lien on the land assessed for the period of two years "from the date of said recording." The section also declares that from and after the date of said recording all persons named in section 11 of the act shall be deemed to have notice of their contents as recorded. The persons named in section 11 thus referred to are "the owners, whether named in the assessment or not, the contractor or his assigns, and all persons directly interested in any work provided for in the act or in the assessment," and it is provided in this section that they may appeal from the assessment to the city council "within thirty days after the date of the warrant. Section 12 of the act provides that the contractor may bring an action to enforce the assessment, "not less than thirty-five days from the date of the warrant, against those persons who were the owners of the land assessed "on the day of the date of the recording of the warrant."

It is also provided in section 9 that the warrant and other documents shall be delivered to the contractor, on his demand therefor, "after they are recorded." The effect of this provision is, that, until the warrant has been recorded, it has no operative function, and it cannot be delivered to the contractor. Prior to that time it is only a lifeless paper in the hands of the superintendent of streets, subject to alteration or destruction by him, and is not available as the basis of any proceeding on the part of the contractor. Until he has received the warrant he has no authority to demand payment of the assessment; and by section 10 he must make this demand, and return the warrant, with a verified statement of the nature and character of his demand indorsed thereon, "within thirty days after its date."

A consideration of these several provisions of the statute leads to the conclusion that the "thirty days after the date of the warrant," which is the limitation of time upon the right of appeal from the assessment, is to be counted from the time that notice of the assessment is imputed to those who have the right to appeal,—i. e., the date of the recording of the warrant; that as the warrant cannot be delivered to the contractor until after it has been recorded, the date upon which it is recorded, and not the date which is written therein, is its actual date, and the day from which is to be computed the thirty days within which he must return it to the superintendent of streets. It was the evident intention of the legislature that the time within which an appeal might be taken from the assessment, and within which the warrant should be returned to the superintendent, should be the same, and that the contractor should have thirty days from the time at which he was entitled to receive the warrant within which to make his demand and return. Otherwise, or upon the construction contended for by the respondent herein, the superintendent might fail or omit to record the warrant for so long a time after he had written therein the date at which he made it, that these rights of the parties would be essentially impaired, if not destroyed. The statute ought not to receive a construction which would permit such injustice, unless imperatively demanded by its language. The legislature doubtless contemplated that the date of the warrant would be the same as the date of its recording, but it must be held, under the foregoing provisions of the act, that if they do not correspond, the date of the recording is to

be regarded as the "date of the warrant," from which the time within which any action founded thereon, or any right created thereby, is to be computed.

The judgment is reversed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 1900. Department One.—October 29, 1901.]

E. M. GALVIN et al., Appellants, v. E. F. PALMER, Respondent.

JUDGMENTS—VACATION—ENTRY OF SECOND JUDGMENT—CORRECTION—PRESUMPTIONS—COLLATERAL ATTACK.—The court has power to correct its records so that the judgment shall conform to its order; and where a judgment was set aside on the ground that it was entered by the clerk without direction therefor, and the court subsequently ordered the entry of a second judgment, such second judgment must be deemed the true and final judgment in the case; and the action of the court must be presumed correct and within its jurisdiction, in the absence of any showing in the record to the contrary. Its action cannot be impeached by any matter outside of the record, upon a collateral attack.

ID.—NOTICE OF ORDER VACATING JUDGMENT—JURISDICTION—CONCLUSIVE PRESUMPTION.—A party making a collateral attack upon a judgment or order must show by the record that the court did not have jurisdiction; and where the record is silent as to whether the plaintiff knew that the first judgment had been vacated, it will be conclusively presumed that they had notice thereof or consented thereto; and the fact that they did not in fact know that the first judgment had been vacated, and the second one entered, cannot relieve them from its conclusive effect.

ID.—CROSS-COMPLAINT—PROPRIETY OF PLEADING.—The question whether a cross-complaint was a proper pleading or not in the former action could only be inquired into by a direct appeal from the judgment in favor of the cross-complaint therein, and cannot be considered upon a collateral attack in another action.

ID.—WRIT OF ERROR TO SUPREME COURT OF UNITED STATES—STAY OF PROCEEDINGS—CESSATION—DISMISSAL OF WRIT.—A stay of proceedings, consequent upon a writ of error to the supreme court of the United States, fell with the dismissal of the writ of error, and the filing of the mandate thereupon, without the necessity of a specific order vacating the stay.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a motion for a writ of execution and refusing to vacate the judgment and stay the execution. John Hunt, Judge.

The facts are stated in the opinion of the court.

Moses G. Cobb, and Henry C. Dibble, for Appellants.

Thomas C. Huxley, for Respondent.

HARRISON, J.—A judgment was rendered by the superior court in the above-entitled cause, May 3, 1893, declaring the defendant to be the owner in fee and entitled to the immediate possession of certain real property in San Francisco, and that he recover possession of the same from the plaintiffs, and each of them. A new trial was afterwards granted by said court, and upon an appeal therefrom to this court, that order was reversed, and a *remittitur* issued to the superior court, June 27, 1896. (*Galvin v. Palmer*, 113 Cal. 46.) A writ of error afterwards issued thereon to this court, out of the supreme court of the United States, was dismissed, and the mandate of that court remanding the cause was filed in this court, July 11, 1898, and a certified copy thereof was filed in the superior court, July 19, 1898. The defendant then applied to the superior court for a writ of execution for the enforcement of said judgment. After notice of this motion had been given, the plaintiffs gave notice of a motion on their behalf for an order vacating the judgment, or perpetually staying its execution. At the hearing before the superior court, the defendant offered, in support of his motion, the aforesaid judgment in the action, with the *remittitur* from this court reversing the order granting a new trial, and the mandate of the supreme court of the United States dismissing the writ of error. The plaintiffs, in support of their motion, showed that a judgment had been previously entered in the action, April 27, 1893, and also presented an affidavit of one of the plaintiffs to the effect that he had no knowledge of the entry of the judgment of May 3d, or of any other judgment in the cause than that of April 27th, until after the present motion for a writ of possession, and that his attorney had informed him that he had no knowledge of the judgment of April 27th, or of any other judgment than that of May 3d. Across the face of the judgment of April 27th

was written: "Judgment vacated and set aside by order of the court made and filed herein, May 3, 1893." It was also shown that after the entry of this judgment the court made an order, reciting therein that it had been entered by the clerk without any direction of the court therefor, and that it was incomplete and defective, and directing that the entry thereof be vacated, and that the clerk enter in lieu thereof such judgment as the court might afterwards decree. The judgment of May 3d was thereafter signed by the judge and entered by the clerk. After hearing the two motions, the court made an order denying that of the plaintiffs and granting that of the defendant. From this order the plaintiffs have appealed.

The judgment of May 3d must be regarded as the final and only judgment in the action. If two judgments have been entered in a cause, and the record—the judgment roll—is silent in reference to the reason therefor, the latter in point of time must be deemed the true and final judgment in the case. (*Paige v. Roeding*, 96 Cal. 388; *Von Schmidt v. Von Schmidt*, 104 Cal. 547; *Hawley v. Gray Brothers*, 127 Cal. 560.) The right of a court to correct its records so that its judgment as entered shall conform to its judgment as rendered is unquestioned, and its record when so corrected, as well as the order making the correction, is conclusive upon any other court, or in any other proceeding in which the record is offered in evidence. (*Crim v. Kessing*, 89 Cal. 486;¹ *Kaufman v. Shain*, 111 Cal. 16.²) If the court committed any error in setting the former judgment aside, or if there had been any reason why it should not have been set aside, the action of the court could have been reviewed, through a bill of exceptions presented upon an appeal therefrom; but in the absence of such appeal the action of the court will be presumed to have been correct. It had jurisdiction of the parties and of the subject-matter of the action, and as there might have been circumstances under which it would have been authorized to set the former judgment aside, it will be presumed, upon a collateral attack, in the absence of any showing in the record to the contrary, that such circumstances existed in this case. (*Caruthers v. Hensley*, 90 Cal. 559.)

There is nothing in the judgment record herein tending to show any error or irregularity on the part of the court in

¹ 23 Am. St. Rep. 491.

² 52 Am. St. Rep. 139.

causing the judgment of May 3d to be entered, and the silence of the record demands the presumption that it was properly entered. Its verity is to be tested by its own record, and cannot be impeached by affidavits, or by any matter outside of its record. "Purporting to be a judgment of the court, and found regularly entered in its records, the presumption is that it was entered in pursuance of an order of the court." (*Drake v. Duvenick*, 45 Cal. 455.)

The minute order of the court found in the transcript herein, and which is apparently the basis for entering the second judgment, is no part of the judgment roll. (Code Civ. Proc., sec. 670; *Kaufman v. Shain*, 111 Cal. 16.¹) But even if this order could be considered, it clearly appears from the recitals therein that the court was justified in setting the first judgment aside. There is nothing in the record of the judgment tending to show that the action of the court was had without any notice to the plaintiffs, and under the maxim, *Omnia praesumuntur*, it will be presumed, if necessary, that they did have such notice, or even that they consented to the order. (*Parker v. Altschul*, 60 Cal. 380; *Hawley v. Gray Brothers*, 127 Cal. 560.) A party making a collateral attack upon a judgment or order must show by the record that the court did not have jurisdiction to make such order or judgment. The fact that the plaintiffs did not know that the first judgment had been vacated and the present one entered does not relieve them from its conclusive effect. The affidavit on their behalf shows, however, that their attorney had full knowledge of the entry of the judgment of May 3d.

Whether a cross-complaint was a proper pleading in the former action is not open to consideration upon the present appeal. That question could have been determined only by an appeal from the judgment in favor of the cross-complainant.

Whatever stay of proceedings was consequent upon the writ of error issued from the supreme court of the United States fell with the dismissal of that writ and the filing of the mandate thereon. It was not necessary that there should have been a specific order vacating the stay caused by the issuance of the writ.

The order is affirmed.

Van Dyke, J., and Garoutte, J., concurred.

[S. F. No. 1832. Department One.—October 31, 1901.]

E. F. SCHUMACHER, Appellant, v. I. J. TRUMAN et al.,
Respondents.

DIVORCE—DIVISION OF COMMUNITY PROPERTY—TENANCY IN COMMON—

UNRECORDED SEPARATION AGREEMENT—BONA FIDE PURCHASER.—A *bona fide* purchaser of an undivided half interest in community real estate, awarded by a decree of divorce to the wife, as a tenant in common with the husband, is protected as against an unrecorded agreement for separation made between the husband and wife, which it was agreed should control all property rights in case of divorce, where the purchaser had no actual or constructive notice of such agreement.

ID.—POSSESSION OF TENANT OF HUSBAND—POSSESSION OF WIFE—PRESUMPTION—PURCHASER NOT PUT UPON INQUIRY.—The possession of a tenant of the divorced husband after the decree of divorce must be presumed to be the possession of the divorced wife, as a tenant in common with him, and is consistent with and not adverse to the record title of the divorced wife, and did not put the purchaser from her upon inquiry as to any equitable rights of the divorced husband under the unrecorded agreement.

ID.—POSSESSION, WHEN AND WHEN NOT NOTICE TO PURCHASER—INQUIRY, WHEN NOT A DUTY.—The rule that one who purchases land, not at the time in the possession of the vendor, takes in subordination to the rights of third persons in actual possession, is subject to the qualification that the possession must be not only open and notorious, but also exclusive, and inconsistent with the record title. Inquiry does not become a duty when the apparent possession is consistent with the title appearing of record.

ID.—NEGLIGENCE OF HUSBAND—ESTOPPEL.—The negligence of the husband in permitting the record title to the undivided one half of the community property to remain of record, and in failing to give record notice of any application to set aside the decree as against the wife, estops him from questioning the title of a *bona fide* purchaser claiming under the wife, who took her record title for full value without notice of any claim or action of the husband inconsistent therewith.

APPEAL from a judgment and order of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion.

Nagle & Nagle, for Appellant.

I. J. Truman, Jr., for I. J. Truman, Respondent.

L. A. Gibbons, for Ida J. Martens and F. Martens, Respondents.

HARRISON, J.—Action to determine an adverse claim to certain real estate in the county of San Mateo.

The findings of fact herein show that on June 8, 1895, and prior thereto, the plaintiff and the defendant Ida J. Martens—then the wife of the plaintiff—were the owners in common of the land described in the complaint, and that on that day they entered into a written agreement, by which the plaintiff was to have the control and management of said land, and that upon his sale of the same, the proceeds thereof should be divided between them, and further, that in case of an action for divorce between them, the agreement should be considered as a settlement of all their property rights; that thereafter an action for divorce was commenced in San Francisco against the plaintiff, by his said wife, in which she asked, in her complaint, that one half of said property be awarded to her; that a copy of said complaint was served upon the plaintiff, and that after its service her attorney stated to him that he would see to it that all his rights were properly protected, and that it was not necessary for him to employ an attorney therefor; that he relied upon said statements, and did not employ any attorney or appear in said action; that thereafter a decree of divorce between them was granted, and that in said decree the defendant Ida—the plaintiff therein—was awarded the undivided half of said property; that said decree was entered of record November 4, 1895; that on November 13, 1896, the said Ida granted the said undivided half of said land to one Morgan, who had been her attorney in the divorce suit, by a sufficient deed of conveyance, which was recorded November 18, 1896; that on February 19, 1897, said Morgan conveyed the property to the defendant Truman by a deed of conveyance, which was properly recorded March 8, 1897, and that said Truman paid therefor its full market value; that the said agreement between the plaintiff and his said wife was never recorded, and that Truman had no knowledge of it, or that either of them claimed any interest in the property purchased by him; that before making said purchase he caused a search of the records to be made, and relied thereon in making said purchase; that on November 17, 1896, the plaintiff applied to the superior court for an order to set aside the judgment in the divorce suit, and to have the same entered in accordance with the aforesaid agreement between him and his wife, but that no notice of said application was placed of record in San Mateo County, and that Truman, at the

time of his aforesaid purchase, or prior thereto, had no knowledge that said application to amend said judgment had been made. The court also found that at all times after the date of said agreement the plaintiff has had a tenant actually and continuously residing on the premises, and claiming to occupy them as his tenant. Upon these facts the court held that Truman was a *bona fide* purchaser for value of the undivided one half of said land, and rendered judgment in his favor therefor.

It is not disputed by the appellant that upon the facts found by the court the record title to the land purchased by Truman was in his grantor, Morgan; but it is contended by him that Truman took the land subject to the aforesaid agreement of June 8, 1895, basing this contention upon the proposition that the possession of the land by a tenant of the plaintiff was notice to all of the plaintiff's right thereto.

The rule that one who purchases land, which is not at the time in the possession of his vendor, takes the same in subordination to the rights of another who is in its actual possession, is subject to the qualification that such actual possession must not only be open and notorious, but also that it be exclusive, and inconsistent with the record title. (*Smith v. Yule*, 31 Cal. 180;¹ *Staples v. Fenton*, 5 Hun, 172; *Pope v. Allen*, 90 N. Y. 298; *Holland v. Brown*, 140 N. Y. 344; *Rankin v. Coar*, 46 N. J. Eq. 566; *Ellison v. Torpin*, 44 W. Va. 414; *Munn v. Achey*, 110 Ala. 628; *Lance v. Gorman*, 136 Pa. St. 200.²) Such possession is not, of itself, notice, but merely evidence tending to prove notice sufficient to put the purchaser on inquiry (*Emeric v. Alvarado*, 90 Cal. 471); and "inquiry does not become a duty when the apparent possession is consistent with the title appearing of record." (*Smith v. Yule*, 31 Cal. 180.¹) "What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell." (*Meehan v. Williams*, 48 Pa. St. 238.) "The rule is universal, that if the possession be consistent with the recorded title, it is no notice of an unrecorded title." (*Kirby v. Tallmadge*, 160 U. S. 379.) If the actual possession is consistent with the record title, it will be presumed to be under that title and referable thereto. (*Plumer v. Robertson*, 6 Serg. & R. 179; *Dutton v. McReynolds*, 31 Minn. 66; *Harding v. Seeley*, 148 Pa. St. 20.)

¹ 89 Am. Dec. 167.

² 20 Am. St. Rep. 914.

Under these principles, it must be held that the possession of the land by a tenant of the plaintiff did not give any notice to Truman of the plaintiff's claim derived under the unrecorded agreement between him and his wife. By the terms of the judgment in the divorce suit, the plaintiff and his wife became tenants in common of the land, and upon the recording of that judgment, notice was given to the world of the character and extent of their respective interests therein. There was thereafter no change in the character of the plaintiff's possession, nor did he in any manner indicate that his possession was hostile to the claim of his co-tenant. The possession by his tenant was no greater notice of his claim of title than would have existed if he himself had been in the actual occupation of the land. By virtue of being a co-tenant with his former wife, he was entitled, as against every one except her, to the possession of the whole of the land. But such possession was at the same time the possession of his co-tenant, and is presumed to have been in her interest and for her benefit, as well as for himself. (*Freeman on Cotenancy*, sec. 167; *Unger v. Mooney*, 63 Cal. 586;¹ *Wilcox v. Loominster National Bank*, 43 Minn. 541.²) As he was therefore entitled to the possession of the whole of the land, his possession was consistent with the record title, and Truman had the right to assume that such possession was in accordance with that title, and was not required to inquire of him whether he had some unrecorded claim in addition thereto. (*McNeil v. Polk*, 57 Cal. 323.)

The right of Truman, in making the purchase, to rely upon the record title is due to the laches of the plaintiff himself, rather than to any negligence on his part. The plaintiff failed to place upon record the agreement between himself and his wife. He was informed by the complaint in the divorce suit that his wife asked for an undivided half of the land, and he knew that if he suffered default in the action, such judgment might be given her. His reliance upon the promise of her attorney to protect his rights in the property did not impair the force of that judgment, or the right of others in dealing with the property to rely upon its terms, so long as he permitted it to remain of record. He not only allowed more than a year to elapse after the judgment had been entered before he sought to have it

¹ 49 Am. Rep. 100.² 19 Am. St. Rep. 259.

amended, but he did not even then give any public notice of such purpose. By holding her out as the owner of an undivided half of the land, he is estopped from disputing the validity of the title acquired by Truman in purchasing the same.

The judgment and order are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 2925. In Bank.—October 31, 1901.]

EDOUARD CHEVASSUS, etc., Substituted for ABEL GUY, Executor of Adolph Gronfier, Deceased, v. LEVI BURR et al., Respondents.

MOTION TO DISMISS APPEAL—FAILURE TO FILE TRANSCRIPT—CERTIFICATE OF CLERK—AFFIDAVIT FOR RESPONDENT.—A motion to dismiss an appeal for failure to file the transcript within time must be heard upon the certificate of the clerk, and an affidavit for the respondent cannot be considered for the purpose of determining the character of the records kept by the clerk, or from what order the appeal was taken.

ID.—INSUFFICIENT SHOWING AS TO ATTORNEYS—SERVICE OF NOTICE OF APPEAL.—Where the certificate of the clerk fails to state, and it does not otherwise appear, who were the attorneys for the respective parties, or who was the attorney by whom the notice of appeal was given, the showing upon that subject is insufficient to sustain the motion to dismiss the appeal for failure to file the transcript.

ID.—SERVICE OF MOTION UPON EXECUTRIX NOT SUBSTITUTED—ESTATE OF APPELLANT NOT BROUGHT IN.—Where the action was commenced by an executor of the will of a deceased person, and the appellant was substituted for such executor, and died after the appeal was taken, an acknowledgment of service, made by his executrix, of the motion to dismiss the appeal, without any substitution of such executrix, or any showing that she represented the original estate, is insufficient to bring the original estate interested as appellant before the court.

MOTION to dismiss an appeal from an order of the Superior Court of the City and County of San Francisco dismissing an action. The notice of the motion was addressed to Louise R. Chevassus, executrix of the estate of

Edouard Chevassus, deceased, appellant, and she acknowledged, in writing, service of the motion, *in pro. per.*, as such executrix. Further facts are stated in the opinion of the court.

T. M. Osmont, for Respondents.

HARRISON, J.—Motion to dismiss the appeal for failure to file the transcript within the time prescribed by the rules of this court. The motion is presented upon a certificate of the county clerk and an affidavit of Morgiana Sammis, one of the respondents.

The suit is in ejectment, and a judgment of dismissal was entered in the superior court, June 22, 1897. An order denying a motion to vacate this order of dismissal was made October 1, 1897. The notice of appeal was filed November 29, 1897. The affidavit on behalf of the respondents states that this notice was of an appeal from the order denying plaintiff's application to vacate said order of dismissal, but in the clerk's certificate it is stated that the notice of appeal was from the order of dismissal, and that the order of October 1st was an order denying the defendants' motion to vacate the order of dismissal. As the certificate of the clerk is the evidence upon which, by the rules of this court, the motion is to be heard, the affidavit cannot be considered for the purpose of determining the character of the records kept by the clerk, or from which order the appeal was taken. It also appears from the certificate of the clerk that the action was commenced by Abel Guy, as executor of the last will and testament of Adolph Gronfier, deceased, and that Edouard Chevassus had been substituted in place of said Guy; and it appears from the affidavit of Sammis that Chevassus died after the appeal was taken, and that Louise C. Chevassus had been appointed by the superior court as executrix of his last will and testament. The certificate of the clerk fails to state, and it does not otherwise appear, who were the attorneys of the respective parties (see *Camenzind v. Kampfen*, 130 Cal. 596), or the attorney by whom the notice of appeal was given, the only statement in reference thereto being that the service of said notice was made "upon defendants' attorney, Walter H. Levy, Esq., as appears by his acknowledgment of service on that date, indorsed upon said notice of appeal." From this it would be inferred that the appeal was taken by the plaintiff from an order denying

his own motion, rather than from one denying a motion made by the defendants. It is not shown, however, that the notice of the present motion was given to the attorney by whom the notice of appeal was given, and there is no evidence of any notice thereof to the appellant, except the admission, indorsed thereon, of a receipt of the notice by "Louise C. Chevassus, executrix of the estate of Edouard Chevassus, decd." It is not shown that there has been any substitution in the superior court in the place of the deceased, Edouard Chevassus, to represent the appellant, and as his executrix would not of necessity become the executrix of the will of Gronfier (Code Civ. Proc., sec. 1353), her admission of a receipt of the notice of this motion is insufficient to bring the estate of Gronfier, as the appellant herein, before this court.

The motion is denied, without prejudice to the right of the respondents to renew the same.

Van Dyke, J., Temple, J., McFarland, J., Garoutte, J., and Beatty, C. J., concurred.

[Crim. No. 761. Department One.—November 1, 1901.]

THE PEOPLE, Respondent, v. JAMES D. PRATHER,
Appellant.

CRIMINAL LAW—IMPANELMENT OF GRAND JURY—DIFFERENCE IN FORM—SPECIAL VENIRE.—The impanelment of a grand jury from an entire *venire*, consisting of thirty names placed in the box, four of whom were not served by the sheriff, the panel, so far as formed therefrom, being composed of jurors present and not excused, is purely a difference in form only, from the requirement of the statute that the names of those jurors who were present in court and not excused should be placed in the box; and where there was a failure to secure nineteen grand jurors from the regular *venire*, it was regular for the court to complete the impanelment from a special *venire*.

ID.—PLEADING—DEMURRER SUSTAINED TO INFORMATION—ORDER FOR NEW INFORMATION—INDICTMENT.—Although the court, upon sustaining a demurrer to an information, ordered that another information should be filed, the defendant may nevertheless be presented by indictment for the offense charged in the information without an order of court submitting it to the grand jury.

ID.—INDICTMENT FOR PERJURY UPON TRIAL FOR LARCENY—EVIDENCE—IMMATERIAL VARIANCE.—The variance is immaterial between an indictment for perjury, alleged to have been committed upon a trial for grand larceny, under an information described as charging that the property stolen in another county was "feloniously" brought into the county of the venue, and the information placed in evidence, which omitted the word "feloniously," while in every other particular the information pleaded and the one proved exactly corresponded. The defendant could not be prejudiced by such variance, for the reason that the word "feloniously" was not necessary to the validity of the information.

ID.—EVIDENCE—VERDICT AND JUDGMENT IN LARCENY CASE—CURE OF ERROR.—Whatever error was committed in receiving in evidence the verdict and judgment in the larceny case was cured by taking such evidence away from the jury and instructing them to disregard it.

ID.—MATERIALITY OF PERJURED TESTIMONY—IDENTIFICATION OF STOLEN PROPERTY.—The materiality of the alleged perjured testimony, given upon the trial for larceny, appears from proof that it had a strong tendency to weaken the evidence going to the point of identification of the stolen property, which was the vital point in the case.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. R. C. Rust, Judge presiding.

The facts are stated in the opinion of the court.

J. Charles Jones, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

GAROUTTE, J.—Defendant has been convicted of the crime of perjury, and appeals from the judgment and from the order denying his motion for a new trial. He first attacks the validity of the impanelment of the grand jury which found the indictment against him.

Among other matters, section 242 of the Code of Civil Procedure provides: "When, of the persons summoned as grand jurors, and not excused, nineteen are present, they shall constitute the grand jury. If more than nineteen of such persons are present, the clerk shall write their names on separate ballots, which he must fold so that the names cannot be seen, place them in a box, and draw out nineteen of

them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than nineteen of such persons are present, the panel may be filled as provided in section 226 of this code." In this case the *venire* consisted of thirty, four of these not being served by the sheriff. Instead of strictly following the statute by placing in the box the names of those jurors who were present in court and unexcused, the court proceeded to draw the jury from the entire thirty names placed in the box, and thus impaneled the jury from those present and not excused. The difference in the manner of forming the jury between the course followed and the course prescribed by the statute is purely a difference in form only. (*People v. Leonard*, 106 Cal. 317.) Having failed to secure nineteen jurors from the regular *venire*, the court completed the jury from a special *venire*, and the course thus pursued was strictly regular.

The validity of the indictment is assailed in various ways and upon various grounds. The chief objection is based upon the fact that a demurrer was sustained to an information charging the defendant with the crime here charged, and thereupon the court ordered a new information to be filed. In view of this action of the trial court, it is now claimed that the defendant could not thereafter be prosecuted by indictment for the offense charged in the information. The practice here pursued was followed in *People v. Whelan*, 117 Cal. 559, and in that case the court said: "Nor did the facts warrant the arrest of judgment. It was within the jurisdiction of the grand jury to take cognizance of the charge without an order of court submitting it to them. No such order was required, as the charge had not previously been examined by that or any former grand jury; and a demurrer having been sustained to the information, with a direction that a new one be filed, the *status* of the charge was, in all material respects, the same as though no information had ever been filed." The law as here enunciated is entirely satisfactory to the court.

It is next claimed that error was committed in admitting in evidence the information in the case of *People v. Prather*, ante, p. 386. Defendant is charged with having committed perjury by giving false testimony in the above-entitled case. The objection to the admission of the aforesaid information

in evidence is based upon a claim of variance, the present indictment alleging that the information charged Davis and Prather with having *feloniously* brought certain sacks of buckwheat into the county of Sacramento, while the information offered in evidence does not contain the word "feloniously." In *People v. Prather*, ante, p. 386, it was held that the word "feloniously" was not necessary to the validity of the information in that case. In every other particular the information set out in this indictment corresponds to the information offered in evidence. The identity of the two as being the same instrument is absolute, and for this reason the variance in the respect noted, viewed from every standpoint, is wholly immaterial, and therefore unprejudicial to defendant. Whatever error may have occurred in the admission in evidence of the verdict and judgment in the larceny case was cured by the subsequent action of the trial court in taking that evidence away from the jury. At that time the court instructed the jury specially not to consider the evidence so taken from them, and it will be presumed that the jury obeyed that instruction. In certain exceptional cases the action of a court in withdrawing evidence from the jury, which it deems erroneously admitted, may not be held to cure the error committed in its admission, but under any ordinary circumstances the court should be allowed to correct an error of this kind, and it could be done under the present circumstances.

It is next claimed that the evidence does not show that the alleged perjured testimony was material to the issue upon the trial of the larceny charge. In that case the defendants were charged with stealing forty-eight sacks of buckwheat. This defendant then testified that he delivered fifty sacks of buckwheat to his brother (a defendant in the larceny case) about the time the larceny was committed. The purpose of this testimony was to account for the buckwheat which the prosecution claimed was the stolen property. A great portion of the evidence in the larceny case was introduced for the purpose of proving or disproving the testimony of this defendant, that he delivered certain sacks of buckwheat to the brother. It appeared to be the vital point in the case. The identification of the stolen property was claimed by the defense to be insufficiently established, and this evidence of the defendant as to the delivery of a certain number

of sacks of buckwheat to his brother certainly had a strong tendency to weaken the evidence going to the point of identification.

There are a great many objections and exceptions taken to the ruling of the court, arising during the progress of the trial. Indeed, these exceptions almost reach into the hundreds. The court has examined them all with care, and aside from those noticed, it may be said they are too technical and too insubstantial to demand extended consideration.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 29th of November, 1901:—

BEATTY, C. J.—I dissent from the order denying a rehearing. There were, in my opinion, several material and prejudicial errors committed by the superior court in the giving and refusal of instructions to the jury, and particularly in the refusal to instruct the jury that the testimony of the defendant as to selling buckwheat, in 1897, to the Del Monte Milling Company, as charged in the indictment, was wholly immaterial to any issue in the larceny case.

[S. F. No. 1676. In Bank.—November 2, 1901.]

P. FILIPINI et al., Trustees of Galileo Grove, U. A. O. D., Respondents, v. ANTONIO TROBOCK et al., Defendants. MARY TROBOCK, Appellant.

MORTGAGE—PRIOR UNRECORDED DEED TO ATTORNEY IN FACT—REPRESENTATION AS TO TITLE.—ESTOPPEL.—One who executed a mortgage as attorney in fact for his grantor, from whom he held an unrecorded deed, and who represented to the mortgagee, who advanced money upon the faith of the mortgage, that his principal was the owner of the land mortgaged, is estopped from setting up title in himself, except in subordination to the mortgage; and the estoppel is equally binding upon his wife, who succeeded to his interest, as distributee of his estate.

ID.—RECORD OF DEED BY WIDOW—DISTRIBUTION OF ESTATE—FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS.—Where the widow of the deceased attorney in fact found the unrecorded deed among his papers, and recorded it, and subsequently received sole distribution of the land, the effect of the record of the deed and of the distribution to her is the same as if the deed had been executed to his estate when it was recorded; and her estoppel to deny that the mortgagee was the owner of the land at the date of the mortgage does not extend to the depriving her of the right, as a subsequent grantee, to plead the statute of limitations in an action to foreclose the mortgage. [McFarland, J., dissenting.]

ID.—PARTIES TO FORECLOSURE—RUNNING OF STATUTE—ABSENCE OF MORTGAGOR.—Where the deed to the deceased husband was recorded before the maturity of the note, such record made the widow, who was his sole devisee of the land mortgaged, a proper and necessary party to an action to foreclose the mortgage; and where more than four years elapsed after maturity of the note, and after distribution of the land to the widow, the action to foreclose the mortgage is barred as to her, notwithstanding the absence of the mortgagor from the state continuously after the maturity of the note.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

P. A. Bergerot, and Rodgers, Paterson & Slack, for Appellant.

There was no finding upon the material issue of the statute of limitations; and the record shows that the action was barred as to the appellant, who had the right, as a grantee of

the mortgaged premises, to plead the statute in her own behalf, without reference to whether the action was barred or not as to the mortgagors. (2 Wood on Limitations, sec. 224; *Lord v. Morris*, 18 Cal. 482, 490; *McCarthy v. White*, 21 Cal. 495, 501;¹ *Grattan v. Wiggins*, 23 Cal. 16, 25; *Coster v. Brown*, 23 Cal. 142, 143; *Lent v. Morrill*, 25 Cal. 492, 499; *Low v. Allen*, 26 Cal. 141, 144; *Lent v. Shear*, 26 Cal. 362, 369; *Barber v. Babel*, 36 Cal. 11, 20; *Wood v. Goodfellow*, 43 Cal. 185, 188; *Jeffers v. Cook*, 58 Cal. 147; *Watt v. Wright*, 63 Cal. 202; *Arthur v. Screven*, 39 S. C. 77; *Zoll v. Carnahan*, 83 Mo. 35; *Fowler v. Wood*, 78 Hun, 304.) The failure to record the deed simply made it an instrument of conveyance subject to the mortgage. (*Emeric v. Alvarado*, 90 Cal. 444, 471; *Jeffers v. Cook*, 58 Cal. 147.)

I. J. Truman, Jr., and J. E. Segur, for Respondents.

The unrecorded deed was fraudulent and void as to the mortgagee, by being concealed and kept off record. (Bump on Fraudulent Conveyances, 3d ed., p. 39; *Goldsby v. Johnson*, 82 Mo. 602; *Hildreth v. Sands*, 2 Johns. Ch. 35; *Beecher v. Clark*, 12 Blatchf. 266; *Blackman v. Preston*, 24 Ill. App. 237; *Scrivenor v. Scrivenor*, 7 B. Mon. 374.) Mary Trobock stands in the shoes of Nicolas Trobock, and is bound by the same estoppel as that which bound him. (*Tilton v. Nelson*, 27 Barb. 598.) The subsequent record of the deed was not sufficient notice to the prior mortgagee. (Wade on Notice, 2d ed., p. 203; Devlin on Deeds, sec. 716.)

BEATTY, C. J.—This is an appeal by Mary Trobock from an order denying her motion for a new trial. The order was affirmed by Department, upon the following statement and opinion:—

“Judgment was rendered by the lower court against the appellant, Mary Trobock, and her co-defendant, Antonio Trobock, for the foreclosure of a mortgage for two thousand dollars and interest, executed to the plaintiff by the latter. Mary Trobock appeals from an order denying her motion for new trial.

“1. The main question in the case is, whether the action was barred, as against her, by the statute of limitations. The facts bearing on this question, as they appear from the pleadings and findings, are as follows: The complaint was filed

¹ 82 Am. Dec. 754.

July 23, 1896. The mortgage and note, which were payable three years after date, were executed December 8, 1886, in the name of Antonio, by Nicolas Trobock (husband of appellant), his attorney in fact, who represented to the plaintiff's trustee and attorney, and induced them to believe, that the money was borrowed for Antonio Trobock, and that he was the owner of the land mortgaged, and the title in fact so appeared from the records in the recorder's office, but in fact a deed had been made by Antonio to Nicolas Trobock in 1870, though never recorded, and the latter knew of this condition of the title. Nicolas died in 1889. The unrecorded deed was found among his papers by his wife, the appellant, and recorded September 2, 1889, and in the year 1890 the land was distributed to her by the final decree of distribution. The interest on the note and mortgage was paid by Nicolas during his lifetime, and afterwards, up to August 1, 1893, by the appellant. Antonio Trobock has been absent from the state of California, and a resident of Ragusa, Austria, ever since the maturity of the note.

"The specific objection of the appellant is, that there is no finding as to appellant's plea that the action was barred by the provisions of section 337 of the Code of Civil Procedure. But I think the issue was disposed of by the finding of the specific facts, as stated above; and it was unnecessary to find expressly that the action was not barred by the provisions of the section of the statute relied on.

"The unrecorded deed from Antonio to Nicolas, held by the latter at the time of the mortgage, was void as to the mortgagee, the plaintiff in this case. (Civ. Code, sec. 1214.) The representations of Nicolas to the plaintiff's officers, to the effect that Antonio was the owner of the land mortgaged, was therefore, so far as the mortgage was concerned, in effect, true; and whatever title had accrued to him under the deed from Antonio became, by his own deliberate written act, subject to the mortgage. He probably so understood the effect of the transaction; and in view of the presumptions that a person is innocent of wrong, and that he intends the ordinary consequence of his voluntary act, it is to be presumed that he so understood it. (Code Civ. Proc., sec. 1963, subds. 1, 3.) But however this may be, Nicolas was, at all events, estopped by his express declarations as to the ownership of the property from setting up title in himself,

except in subordination to the mortgage (1 Herman on Estoppel, sec. 3; 2 Id., secs. 730 et seq., 736; Code Civ. Proc., sec. 1962, subd. 3; Civ. Code, sec. 1709); and the estoppel is equally binding on his wife, the appellant, who succeeded to his interest as a mere volunteer. (1 Herman on Estoppel, sec. 20; Bigelow on Estoppel, 512, 607, 608.) Mrs. Trobock stands, therefore, precisely in the position of her predecessor. She took the title subject to the mortgage, and is equally estopped to deny that Antonio was the owner, and that, in the absence of a conveyance by him, he continued to be the owner."

After the decision in Department affirming the order of the superior court upon the grounds stated in the foregoing opinion, a rehearing was granted, because it was thought that the doctrine announced in *Wood v. Goodfellow*, 43 Cal. 185, was infringed by that part of the opinion in which it was held that the plea of the statute of limitations was disposed of adversely to the appellant by the specific facts found by the superior court and stated in the opinion. The case having been resubmitted to the court in Bank, we are now to consider whether, upon the facts as found, the statute of limitations was a bar to the action against Mary Trobock.

There can be no doubt that she is estopped to deny that Antonio Trobock was the owner of the land at the date of the mortgage, and that her title is subject to the mortgage; but we think there can be as little doubt that after she had recorded the deed from Antonio to her deceased husband, her position as successor to her husband became, and continued to be, no better and no worse than if the deed had been made the day it was recorded. By recording the deed she gave the same notice to the mortgagee of her rights that would have been given by the record of a deed of that date to her, or to any other person, and whatever rights accrue to any purchaser of mortgaged premises by the recording of his deed accrued to her. The estoppel raised by the representations of her deceased husband could only operate to protect the mortgagee from the consequences of the step it was induced to take by its belief in the truth of those representations. The only fact represented to the mortgagee was, that Antonio was the owner of the land and that his mortgage would bind it. Upon that representation the respondent made the loan and accepted the mortgage as security. To allow Nicolas or his successor now to set up a title under the deed of 1870, superior to the mortgage, would be to

sanction a gross fraud, but nothing of the sort is attempted by the appellant. She concedes that her ownership of the land is subject to the mortgage, and only asserts the rights, whatever they are, of a subsequent grantee.

These are the rights which are denied her by the decree of the superior court, and the effect of the decree is to extend the estoppel to matters in no way involved in any representation made by Nicolas, and to protect the mortgagee against acts and omissions to which no prudent or reasonable man would have been induced by the belief that Antonio was the owner of the land at the date of the mortgage. To raise an estoppel, the representation must be such as would induce a reasonable person to act upon it, and it is only binding to the extent that it has been acted upon. Here was a representation which it is conceded was sufficient to induce a reasonable person to accept the mortgage as security, and it was so accepted; but was there anything said or done which could excuse the mortgagee for waiting seven years after the maturity of the note and the record of a conveyance from his mortgagor before commencing his action to foreclose? A mortgagee is bound to know that his mortgagor may convey the premises subject to his mortgage; and if the record of a subsequent conveyance will set the statute of limitations running in favor of the grantee, we cannot perceive any reason why the appellant may not avail herself of its bar. As a matter of the commonest business prudence, the respondent was bound to inform itself as to any recorded deed from Antonio Trobock, and the same care that would have enabled it to discover a subsequent conveyance would have revealed the existence of the conveyance under which appellant claims. If, therefore, the record of her deed made her a necessary or proper party to this action,—as it unquestionably did,—the right of action as to her accrued at the maturity of the note in December, 1889, and at that date the statute of limitations was set in motion in her favor, notwithstanding the absence of Antonio Trobock from the state. This is the clear result of the decision in *Wood v. Goodfellow*, 43 Cal. 185. In its facts, that case differed in some particulars from this case; the plea of the statute was interposed by a *subsequent* grantee, but, as we have endeavored to show, that fact is of no consequence, and the first mortgagee in that case had actual notice of the subsequent liens more than five years prior to the commencement of the fore-

closure suit, but the fact of actual notice was wholly irrelevant to the point decided. The doctrine of the case is contained in the following extract from Judge Crockett's opinion: "When the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment, under the mortgage, which is a contract in writing, by which the property is pledged as a security for the debt. The mortgage, in such a case, has the same effect in law as if it had been originally made as a separate instrument by the parties succeeding to the rights of the mortgagor to secure his debt. If A make a mortgage on his own property to B, to secure a debt owing from C, the action to foreclose the mortgage must be brought within four years from the time when the debt became due. The time could not be prolonged by any stipulation between B and C to which A was not privy. But when the four years were about to expire, could C, under our law, indefinitely postpone the bar of the statute, and render it nugatory as to A, by absenting himself from the state and never returning? The argument of the plaintiff's counsel necessarily leads to this result. But we have not heretofore so interpreted the statute. On the contrary, we have uniformly held in analogous cases that the mortgage, as contradistinguished from the mortgage debt, in such cases is to be deemed a contract in writing, in the sense of the statute, on which the action must be brought within four years from the time when the action would lie, in order to avoid the bar of the statute. If we had any doubt, on reason or authority, whether the rule is proper, it has been too long established in this state to be now disturbed."

The deed under which the appellant claims was recorded before the maturity of the note, and it is the record of such a deed, not actual notice, which determines the right of the grantee to be made a party to the foreclosure in order to be bound by the decree. (Code Civ. Proc., sec. 726.) The appellant, therefore, was a proper party to this action nearly seven years before it was commenced, and as to her, on the

facts found by the superior court, it was barred by section 337 of the Code of Civil Procedure.

The order denying her motion for a new trial is reversed.

Van Dyke, J., Temple, J., and Harrison, J., concurred.

McFARLAND, J., dissenting.—I am not able to concur. In my judgment, the order denying the new trial should be affirmed, upon the opinion delivered in Department. I do not think that the old deed from Antonio to Nicolas can be considered at all; the appellant is estopped from setting up any claim under it. The representation that Antonio owned the property at the date of the mortgage—upon which representation respondent loaned its money and took his mortgage as security—forever estopped Nicolas and his privy, the appellant, from asserting that Antonio had prior to that time conveyed the property to Nicolas. The recording of the prior deed to Nicolas, many years after its execution, gave it no life as against the estoppel; and I see no ground for holding that it was, by its recordation, legally transmuted into a new deed. It was not in fact a new deed; it always was, and is now, the identical deed which appellant is estopped from asserting. Whether or not Nicolas or appellant could have procured another deed from Antonio after the mortgage does not appear; the fact is, that he did not make such a deed, and appellant is compelled to rely on the old one, in the face of the said representation made at the time of the mortgage.

The foregoing view makes it unnecessary to consider the question whether the recordation of a subsequent deed by a mortgagor to a third person, who is a *bona fide* purchaser, gives constructive notice to a prior mortgagee from the date of such recordation. In *Wood v. Goodfellow*, 43 Cal. 185,—the case mainly relied on by appellant,—there was actual notice, and I have seen no cases where it was held—the question being raised—that the recording of a subsequent deed or mortgage was constructive notice to a prior mortgagee. The general rule is, of course, that the recording is notice only “to subsequent purchasers and mortgagees.” (Civ. Code, sec. 1213.) But in the case at bar there is no question as to the rights of a *bona fide* subsequent grantee or mortgagee for a valuable consideration and free from fraudulent representations. Here, Nicolas represented, and is estopped

from denying, that Antonio owned the property at the date of the mortgage, and that Nicolas did not own it; and it seems to me unwarrantable to hold that, *as against Nicolas himself*, the respondent was bound to keep constant watch of the public records to see if the representations of Nicolas, upon which he had the right to rely, were true. And if he had examined the records, he would have merely found a deed which Nicolas had at the very time he represented that he had no such deed. Would that discovery have changed the legal phase of the case in any way whatever?

[Sac. No. 777. Department Two.—November 5, 1901.]

THOMAS BROWN, Respondent, v. SAN FRANCISCO SAVINGS UNION, Appellant.

CONTRACTS—NUDUM PACTUM—OPTION TO PURCHASE LAND—PROPOSAL NOT ACCEPTED—WITHDRAWAL.—An option given to a real estate agent proposing to sell lands, but wishing himself to purchase the same, to buy within a time limited, upon certain terms and conditions, of which no notice of acceptance was given, and for which no consideration was paid, and which he is free to exercise or not, is a mere *nudum pactum*, and amounts only to a continuing proposal, which may be withdrawn by the party making it before such notice of acceptance is communicated; and after notice of such withdrawal the option cannot be exercised.

APPEAL from a judgment of the Superior Court of Glenn County and from an order denying a new trial. Oval Pirkey, Judge.

The facts are stated in the opinion of the court.

Henry C. Campbell, and Donald Y. Campbell, for Appellant.

A proposition in writing to sell land at a certain price, within a given time, is a continuing offer, which may be retracted at any time before acceptance, in the absence of consideration for the offer. (*Wristen v. Bowles*, 82 Cal. 84; *Connor v. Rennecker*, 25 S. C. 514; *Boston and Maine R. R.*

Co. v. Bartlett, 3 Cush. 224; *Burnet v. Biscoe*, 4 Johns. 235; *Tucker v. Woods*, 12 Johns. 189; *Weaver v. Burr*, 31 W. Va. 736; *Ide v. Leiser*, 10 Mont. 5;¹ *Coleman v. Applegarth*, 68 Md. 21;² *Gordon v. Darnell*, 5 Col. 302; *Bean v. Burbank*, 16 Me. 458;³ *McDonald v. Bewick*, 51 Mich. 79; *Perkins v. Hadsell*, 50 Ill. 216; *Litz v. Goosling*, 93 Ky. 185.)

Frank Freeman, Charles L. Donohoe, and B. F. Geis, for Respondent.

A proposer may bind himself to keep open a proposal until a specified date, so that an acceptance at any time within that date will be good. The entertaining of the offer involves a suspension of inquiry in other quarters, which is a sufficient consideration. (1 Wharton on Contracts, sec. 12; *Weaver v. Burr*, 31 W. Va. 736.)

HIENSHAW, J.—Plaintiff prosecuted this action to obtain damages from defendant for its alleged breach of an option to sell land. Judgment passed for plaintiff, and from that judgment and from the order denying defendant's motion for a new trial defendant appealed. The following facts disclose the transaction between the parties: Defendant was the owner of certain land in Glenn County, known as the "Graves place." Upon March 27, 1896, plaintiff wrote to defendant, stating that a good many people were in the neighborhood, looking for land, and asking the price and terms upon which defendant would sell the land in question. To this letter defendant made reply, upon March 30th, stating the selling price—\$7,400—and the terms of payment, adding that parts of the land were under lease, but that no difficulty was anticipated, in the event of a sale, in securing a surrender of the leases or attornment of the tenants. In reply to this, upon April 16th, plaintiff wrote more specifically, that he had some Danish people looking at the land with the intent to purchase, and concluded that if he obtained an option upon the tract for six months he believed he could dispose of it. Upon the following day, the defendant corporation wrote that if it were to give an option it could not extend beyond the end of September, 1896, and if the right of purchase was exercised it would expect interest upon the purchase price

¹ 24 Am. St. Rep. 17.

³ 33 Am. Dec. 681.

² 6 Am. St. Rep. 417.

from the date of the option. It further explained as to one of the tenants, that if he should fallow his land and not be allowed to seed it, the bank would expect the holder of the option to compensate him for his labor in the event that the option was exercised. Upon April 19th, Brown wrote in acknowledgment of this last letter, reciting the conditions therein set forth, declaring that he regarded them as right and proper, and adding that he was satisfied that he could make a sale of the property within the time named if the bank would give him a contract up to that time. He then proceeds to explain that he has other prospective purchasers besides the Danish people, and that his object in making the sale is not to secure a profit for himself therefrom, but to dispose, at the same time, of other contiguous lands, of which he is owner. Upon April 21st the corporation replied that a formal contract was unnecessary, and that Brown might hold its letter of the 17th as a contract between them, whereby he was privileged to purchase the lands upon the terms and conditions therein mentioned. Upon May 11th, following, the bank wrote that it had discovered that Mr. Harrington had an earlier contract with them for the purchase of the lands, which was in full force and effect; that he had exercised his right of purchase, and that naught remained for it to do but to carry out its part, and added that Brown was thus advised early in order that he might suspend operations, if any were in progress. Upon May 13th, plaintiff replied to this letter, saying, "I have done considerable work toward effecting a sale of the above property, and some of it, I am sorry to say, cannot be undone, providing parties live up to the contract between them and myself, which I executed in good faith, and on the strength of your option to me for a certain consideration. . . . Now, if parties who I have contracted with come forward and pay their money, I cannot see how I am to get out of it. As to suspending operations, I am sorry, but that cannot be done. . . . I would like to be able to say all right, but, under the circumstances, I cannot see any legitimate way out of it for me, only to run the chances of the parties not living up to contract during life of your option to me."

Nothing further passed between the parties until the twenty-fifth day of September, a few days before the expiration of the time fixed in the option, when Brown wrote: "In April, 1896, we entered into a contract, whereby I was given

an option until September 30, 1896, to sell 680 acres of land in Glenn County, known as the 'Fremont A. Graves tract,' belonging to you. I now notify you that I will take the land upon the conditions mentioned in the contract. You can either forward the deed to the Bank of Orland or Bank of Willows," etc. To this the bank promptly replied, upon September 28th, reviewing the sale to Harrington, and the fact that Brown was advised of this upon the 11th of May, and that his option was then recalled, and concluding, "Under these circumstances, we do not think we can be liable to you for anything more than compensation for the time you may have given the matter of selling these lands in the twenty days between the two dates named. We shall not demur to paying you a reasonable sum for the time lost. Please state what you think will be fair compensation." To this, upon the 10th of October, Brown made reply, that he wished nothing but what was fair and reasonable, and that the figure which he was about to name "must be particularly understood as a compromise figure," and then stated that if defendant would pay him the sum of five thousand dollars, such sum would partially repay him for the damages he had sustained. The acceptance of this "compromise figure" was declined by the corporation, and this action followed.

The contract between the parties is that established by the letters, the essential parts of which are as above set forth. It is plain that the defendant believed, and indeed the letters permit no other interpretation, that plaintiff, acting as a real estate agent or broker, had prospective purchasers of the land in view, and sought an option from defendant to enable him to sell. Upon the trial it is shown that these pretenses are disingenuous and false, and this is shown from the lips of plaintiff himself, who declares that from the first his idea was to buy the land for himself. Reading the contract, then, in the light most favorable to plaintiff, as explained by his testimony,—that is to say, that he was not a broker for the sale of the land, but was himself the intending purchaser,—the writings amount to this: that the bank, April 21st, gave an option to plaintiff to purchase the land, subject to certain expressed terms and conditions, which option he was entitled to exercise at any time before the last day of September of that year. Upon the twelfth or thirteenth day of the May following, while this option had been in force but some twenty days, the bank, for reasons stated, withdrew and rescinded it. By the terms of the option, plaintiff bound

himself to nothing; he was free to act under it or not, as he saw fit. Up to the time of its withdrawal he had given no notice whatever of his acceptance of it. No consideration passed from plaintiff to defendant when the option was tendered. Admittedly, plaintiff paid nothing for the option, and his statements contained in his letter of May 13th, to the effect that he had done considerable work toward effecting a sale of the property, which he is sorry to say cannot be undone, providing the parties live up to the contract between them and him, are representations, by his own evidence, admittedly false. Even were they true, as no acceptance of the offer had been made known to defendant, defendant would still have had the right to withdraw it, and it was months after the withdrawal was known to plaintiff that he came forward to exercise the option, which, as he correctly states, had been given him "to sell the land," and then, upon the trial, for the first time, it is made to appear that he had from the first intended to purchase it. The option of the defendant was a mere continuing proposal, which it had the absolute right to withdraw before acceptance had been communicated to it. No such acceptance ever was announced until months after the withdrawal. Up to the time of acceptance, a contract such as this, where no consideration has been parted with, no binding obligation of any kind entered into, is mere *nudum pactum*. The authorities on this point are so numerous, the law upon it so well settled, that it is almost supererogation to refer to them. In instance, however, may be cited, *Wristen v. Bowles*, 82 Cal. 84; *Litz v. Goosling*, 93 Ky. 185; *Weaver v. Burr*, 31 W. Va. 736; *Gordon v. Darnell*, 5 Col. 302; *Coleman v. Applegarth*, 68 Md. 21;¹ *Connor v. Rennecker*, 25 S. C. 514; *Boston and Maine R. R. Co. v. Bartlett*, 3 Cush. 224; *Ide v. Leiser*, 10 Mont. 5.²

For the foregoing reasons the judgment and order are reversed and the cause remanded.

Temple, J., and McFarland, J., concurred.

¹ 6 Am. St. Rep. 417.

² 24 Am. St. Rep. 17.

[Crim. No. 697. In Bank.—November 5, 1901.]

THE PEOPLE, Respondent, v. GONZALES SMITH, Appellant.

CRIMINAL LAW—HOMICIDE—ACQUITTAL OF MURDER—TRIAL FOR MANSLAUGHTER—PEREMPTORY CHALLENGES TO JURY.—A defendant charged with murder, and convicted of manslaughter, is acquitted of murder, and where the conviction of manslaughter is reversed upon appeal, a second trial can only be had upon the charge of manslaughter, and the defendant is entitled upon such trial to no more than ten peremptory challenges to the jury.

ID.—IMPEACHMENT OF PROSECUTING WITNESS—CONTRADICTORY PRIOR TESTIMONY—EXPLANATION—CHARACTER OF DEFENDANT.—A prosecuting witness may be impeached by the defense by proving that his evidence was contradictory to that given at the inquest and the preliminary examination; but the prosecution has an equal right to prove his explanation thereof, to the effect that, knowing the character of the defendant and his brother, he was afraid to testify against them. The defendant cannot complain that the explanation incidentally involved an attack upon his character.

ID.—EXPRESSION OF JUDGE—COMPETENCY OF TESTIMONY.—An expression of the judge in allowing the witness to explain his former evidence, "I think the testimony is all right," imports only that the testimony was competent and admissible, and could not be understood by the jury as intimating that, in the opinion of the judge, the witness was telling the truth.

ID.—ARGUMENT OF COUNSEL—IMPROPER REMARKS—REBUKE AND INSTRUCTION BY JUDGE.—Where, upon the argument of special counsel for the prosecution, highly improper remarks were made, involving a wish that the defendant had thrown down the bars, so that the prosecution might have proved his character, and the court rebuked the counsel, and instructed the jury not to consider the question of the defendant's character, the misconduct was not so serious as to call for a reversal of the judgment.

ID.—EVIDENCE—THEORY OF SUICIDE—POWDER-MARKS ON HAT—CROSS-EXAMINATION—EXHIBITION OF HAT NOT IDENTIFIED.—Where the defense, in order to corroborate a theory of suicide by the deceased, called a witness to show that there were powder-marks on the hat worn by the deceased at the time of the shooting, it was proper for the prosecution, on cross-examination, for the purpose of showing that the witness was no judge of powder-marks, to exhibit to the jury the marks on any hat thought by the witness to bear powder-marks, though not identified nor offered in evidence.

ID.—TECHNICAL ERROR IN INSTRUCTION—SELF-DEFENSE INAPPLICABLE.—A technical error in instructing the jury that displaying of a deadly weapon in a rude, angry, and threatening manner, in the

presence of two or more persons, is a criminal offense, omitting the essential qualification that it was not done in necessary self-defense, is not ground of reversal, where self-defense was wholly foreign to the case, on all the evidence.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Laird & Packard, and J. W. Ahern, for Appellant.

Tirey L. Ford, Attorney-General, for Respondent.

BEATTY, C. J.—The defendant was accused by information of the crime of murder, and by the verdict of a jury found guilty of manslaughter, upon which verdict a judgment was duly entered. On appeal, this court reversed that judgment and remanded the cause for a new trial. (*People v. Smith*, 121 Cal. 355.) Upon the next trial, defendant was again convicted of manslaughter, and he has again appealed. When the cause came on for trial the last time, the defendant, after having challenged ten jurors peremptorily, attempted to interpose another challenge of the same character, to which the people objected that he was entitled to no more than ten such challenges.

The ruling of the court sustaining this objection stands first among the various assignments of error that have been argued in support of the present appeal, and will be first considered. The defendant's contention is, that inasmuch as he was charged by the information with the crime of murder, he was, by the express terms of the statute, allowed twenty peremptory challenges. It is true that section 1070 of the Penal Code does provide that if the offense charged be punishable with death or imprisonment for life, the defendant is entitled to twenty peremptory challenges, and it is true that the crime of murder is punishable with death or imprisonment for life, so that the question is, whether, at the time this eleventh peremptory challenge was interposed, the defendant stood charged with the crime of murder,—whether, in other words, he was on trial for murder; whether the jury about to be sworn could convict him of the crime of murder on the information as it then stood. The informa-

tion had, as above stated, originally charged the crime of murder, which, of course, included a charge of the lesser grade of homicide,—manslaughter. But the verdict and judgment convicting the defendant of manslaughter was, in legal effect, an acquittal of the crime of murder, and eliminated that part of the charge from the information, leaving only the accusation of manslaughter pending, and when a new trial was ordered by this court, it was only a new trial of the pending issue that was intended, and its only effect was to subject the defendant to a new trial on the charge of manslaughter. The authorities everywhere support these views, as do the former decisions of this court. (See *People v. Gilmore*, 4 Cal. 376;¹ *People v. Backus*, 5 Cal. 275; *People v. Apgar*, 35 Cal. 389; *Campbell v. State*, 9 Yerg. 333;² *Jones v. State*, 13 Tex. 168;³ *Baker v. State*, 4 Tex. App. 232; *Cheek v. State*, 4 Tex. App. 448; *Robinson v. State*, 21 Tex. App. 162; *Parker v. State*, 22 Tex. App. 107; *Bell v. State*, 48 Ala. 684;⁴ 1 Bishop's Criminal Procedure, sec. 1271; *Atkins v. State*, 16 Ark. 568; *Johnson v. State*, 29 Ark. 34;⁵ *Brennan v. People*, 15 Ill. 511; *State v. Tweedy*, 11 Iowa, 350; *State v. Boyle*, 28 Iowa, 526; *State v. Clemons*, 51 Iowa, 275; *Hurt v. State*, 25 Miss. 378;⁶ *Morris v. State*, 8 Smedes & M. 762; *State v. Ross*, 29 Mo. 48; *State v. Jenkins*, 36 Mo. 372; *State v. Brannon*, 55 Mo. 63;⁷ *State v. Martin*, 30 Wis. 216;⁸ *Lithgow v. Commonwealth*, 2 Va. Cas. 297; *Stuart v. Commonwealth*, 28 Gratt. 953.) Upon these authorities, and many others that might be cited to the same effect, it is clear that the superior court did not err in holding that, upon the record before it, the defendant stood charged only with the crime of manslaughter, and that he was entitled to no more than ten peremptory challenges.

To a correct understanding of several of the points remaining to be considered, a brief statement of the circumstances of the killing is necessary. The deceased—Bencomo—was killed by a bullet fired from a pistol belonging to the defendant, and the only controversy upon the facts was as to whether the shooting was done by the defendant or by Bencomo himself. Bencomo was the husband of defendant's sister. Defendant testified that they were good friends; that at Bencomo's request he loaned him his pistol to take to his

¹ 60 Am. Dec. 620.

² 30 Am. Dec. 417.

³ 62 Am. Dec. 550.

⁴ 17 Am. Rep. 40.

⁵ 21 Am. Rep. 154.

⁶ 59 Am. Dec. 225.

⁷ 17 Am. Rep. 643.

⁸ 11 Am. Rep. 567.

camp, and that he immediately afterwards shot himself. In this the defendant was corroborated by his brother,—one of the three witnesses who were present at the time of the shooting. According to the testimony of the other witnesses,—Mills and Tapia,—the defendant drew his pistol and immediately commenced firing in the direction of Bencomo, who fell to the ground and expired; that the defendant then placed the pistol by his side, and stated to those attracted to the scene that deceased had shot himself. All the witnesses agree that from three to five shots were fired. In this state of the case the effort of the defense was to show by cross-examination and impeachment of Mills and Tapia, that they did not and could not see what actually occurred. The witness Mills had testified at the coroner's inquest and at the examination before the committing magistrate that at the time of the shooting he was sitting on his horse, drunk and asleep, and, in effect, that he did not see who did the shooting. At the trial he was confronted with this evidence, which he admitted he had given. On his redirect examination he was asked by counsel for the people to explain the discrepancy between his testimony at the inquest and that given at the trial. The defense objected that the people had no right to ask the witness to explain. The objection was overruled, and the witness answered, in effect, that, knowing the character of the defendant and his brother, he was afraid at the time of the inquest to testify against them. The defense moved to strike out this answer, upon the ground that the defendant's character could not be attacked by the people, which motion was also overruled, and the rulings of the court with respect to this matter are assigned as error.

There was no error in these rulings. The defense had a right to impeach the witness by proving contradictory statements made by him at another time, but the state had an equal right to ask and the witness to give his explanation, and if the explanation incidentally involved an attack upon the character of the defendant, he cannot complain. In this connection the defense also took an exception to the language of the court in overruling their motion. The expression objected to was, "I think the testimony is all right." What the judge meant by this expression—and all that he could have been understood to mean, considering it in connection with what preceded and followed it—was, that the testimony was competent and admissible. The jury could

not have understood it as an intimation that, in the opinion of the judge, the witness was telling the truth.

Another exception to be noticed in this connection relates to a statement made by special counsel for the people in the course of his argument to the jury. He referred to the objection made to the testimony of Mills respecting the character of the defendant, and proceeded to say: "Happy, oh happy, would we have been had the defense thrown the bars down and allowed us to prove the character of this defendant." The court, without waiting for an objection from the defense, ordered counsel not to comment upon that matter, and, an objection being made, rebuked the counsel and instructed the jury not to consider the question of defendant's character. The remarks of counsel were, of course, highly improper, and called for a more severe reproof than the court administered; but in view of all the circumstances of the case, we cannot hold that the misconduct was so serious as to call for a reversal of the judgment.

To corroborate their theory of suicide, the defense endeavored to show that there were powder-marks on the hat worn by the deceased at the time of the shooting. The witness called to prove this fact testified that on the day after the homicide he saw a hat lying on the body of the deceased (then in charge of the defendant), and that it exhibited powder-marks. There was no other evidence that it was the hat worn by deceased at the time of the shooting, and the evidence was very unsatisfactory that the hat exhibited at the trial was the same hat seen by the witness on the following day. In this state of the case, the hat having been exhibited to the jury, but not formally offered in evidence, the defendant's witness was asked on cross-examination to point out to the jury what he called powder-marks. To this the defense objected, upon the ground that the hat had not been offered in evidence, and had not been identified. This was, under the circumstances, a rather singular objection to come from the defense, but if the circumstances had been different, the court would have been justified in overruling it. The witness had been called to prove powder-marks on Bencomo's hat, and the object of the cross-examination was to prove that he was no judge of powder-marks. For this purpose it was proper to show the jury any marks on any hat which the witness thought were powder-marks, in order that they might properly estimate the value of his

observations upon the hat which he saw the day after the homicide, and it was for this purpose that the court allowed the hat to be shown to the jury. What has been said in regard to this ruling of the court is a sufficient answer to the further objection made to the remarks of counsel for the people concerning the evidence in question in their argument to the jury.

The court modified several of the instructions requested by the defendant, by striking out portions thereof, and complaint is made of these rulings. It is true that some passages stricken out of the instructions might have been properly allowed to remain, but, in one instance at least, the unobjectionable matter was directly coupled with a statement wholly irrelevant to the case, and only likely to produce confusion; and in that as well as in every other instance, the matter stricken out was but a repetition, in substance, of instructions already given by the court of its own motion.

The case was a very simple one, and the only question the jury had to decide was, Who fired the fatal shot,—the defendant or the deceased? If the deceased shot himself, the defendant, of course, was innocent; but if he was shot by the defendant, there was no possible theory of the evidence upon which he could have been acquitted of manslaughter. Even if the killing was accidental, it amounted to involuntary manslaughter.

There was a technical error in instructing the jury that drawing and displaying a deadly weapon in a rude, angry, and threatening manner, in the presence of two or more persons, is a criminal offense. It is a part—and an essential part—of the definition of that crime that the drawing and displaying of the weapon must not be in necessary self-defense. The omission of that qualification in this instance was, however, of no consequence, because there was no pretense that the defendant had occasion to defend himself against the deceased or any other person. Self-defense was an element wholly foreign to the case, on the defendant's own evidence, and all the evidence.

This disposes of all the exceptions noticed in the argument of counsel for appellant, and we discover nothing more meritorious in any of the other exceptions appearing in the record.

The judgment and order of the superior court are affirmed.

McFarland, J., Van Dyke, J., Temple, J., and Henshaw, J., concurred.

GAROUTTE, J., concurring.—I concur in the judgment. I have no doubt but that the defendant in this case could have been tried and convicted of murder under the information. In other words, if the trial court had held that the previous conviction for the crime of manslaughter was not an acquittal of the charge of murder, and had proceeded to try the defendant again upon the original charge, then in such a case the defendant would have been entitled to twenty peremptory challenges. But here the court, during the impanelment of the jury, directly held that the defendant was only on trial for the crime of manslaughter. It necessarily followed that he was only entitled to ten peremptory challenges. It therefore appears by the record itself that the defendant was only *charged*—that is, defendant was only on trial—for an offense not punishable by death or imprisonment for life.

For the foregoing reasons I concur in the judgment and order denying the motion for a new trial.

[S. F. No. 2693. In Bank.—November 5, 1901.]

ANDERSON ROSE et al., Respondents, v. LOUIS MESMER et al., Respondents; and JOSE ANTONIO MACHADO et al., Appellants.

APPEAL—DISMISSAL—FAILURE TO FILE UNDERTAKING IN TIME.—An appeal will be dismissed for failure to file the undertaking on appeal within five days after proper service of the notice of appeal.

ID.—SERVICE OF NOTICE OF APPEAL—ATTORNEYS OF RECORD—VOID SECOND SERVICE UPON PARTY.—Where the notice of appeal was served upon the attorneys of record of a respondent more than five days before the filing of the undertaking upon appeal, a second service, made personally upon such respondent, who had only appeared by his attorneys, is a mere nullity, and cannot avail to postpone the time required by law for the filing of the undertaking.

MOTION to dismiss an appeal from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Graves, O'Melveny & Shankland, for Andrew J. W. Keating, Appellant.

Lee & Scott, for other Appellants.

Clarence A. Miller, and M. J. McGarry, for Plaintiffs, and Defendant Elizabeth Chauvin, Respondents, moving to dismiss appeal.

HENSHAW, J.—This is a motion to dismiss the attempted appeal of certain defendants in the above-entitled action, upon the ground that the undertaking upon appeal was not filed within the time required by section 940 of the Code of Civil Procedure. The defendants undertook to appeal from a judgment entered upon the sixth day of August, 1900, and served notice of appeal upon all the parties in interest on or before the eleventh day of August, 1900. The undertaking upon appeal was filed upon the seventeenth day of August, 1900. Section 940 of the Code of Civil Procedure declares that "the appeal is ineffectual for any purpose unless within five days after service of the notice of an appeal an undertaking be filed."

Under the foregoing statement of facts, it is apparent that the appeal must be dismissed, but as against the motion it is urged that one J. J. Chapman had been personally served with notice of appeal upon August 15th. While this appears to be true, it is also true that the said Chapman had appeared in the action by his attorneys, Dunnigan & Dunnigan, and service on the said Chapman had previously been made upon August 8th, through his attorneys, Dunnigan & Dunnigan. Chapman had never appeared in the action, excepting through his attorneys, Dunnigan & Dunnigan, and there is nothing in the record to show that they were not, upon August 8th, still his representatives and attorneys. Chapman having thus been served with notice on August 8th, the later service upon him, in person, upon August 15th, was a mere nullity, and could not avail to postpone the time required by law for the filing of the undertaking on appeal.

The motion to dismiss is therefore granted.

Van Dyke, J., Harrison, J., McFarland, J., Garoutte, J., Temple, J., and Beatty, C. J., concurred.

[S. F. No. 2751. In Bank.—November 5, 1901.]

CALIFORNIA CURED FRUIT ASSOCIATION, Appellant, v. W. AINSWORTH and PHOENIX RAISIN SEEDING AND PACKING COMPANY, Respondents.

ACTION FOR CONVERSION—INTEREST LIMITED TO PERCENTAGE—BREACH OF CONTRACT TO DELIVER PRUNES—DAMAGES NOT WITHIN JURISDICTION.—A complaint which sets forth a contract limiting the interest of the plaintiff in a crop of prunes, to be delivered by the defendants to the plaintiff at its packing-house, to two per cent of the prunes, and alleging a breach of the contract, and a conversion by the defendants of the entire crop of prunes, of the alleged value of seven hundred dollars, shows only a cause of action for the recovery of fourteen dollars damages, which is not within the jurisdiction of the superior court, and a demurrer thereto for want of jurisdiction of the subject-matter was properly sustained, and the action dismissed.

ID.—MEASURE OF DAMAGES FOR CONVERSION.—Where the plaintiff is the general owner, or is accountable over to a third person for goods converted, the measure of damages is their value at the time of the conversion; but if the plaintiff has only a special interest or limited property in the goods, he can recover from the owner of the remaining interest only to the extent of his interest therein.

ID.—CIRCUIITY OF ACTION—POLICY OF LAW—ACCOUNTABILITY OF PLAINTIFF AS TRUSTEE—BREACH OF CONTRACT FOR POSSESSION.—To avoid circuity of action, it is the policy of the law that the rights of both parties shall be settled in one action; and where, if the contract were carried out, the plaintiff would be accountable as a trustee of the defendants for their interest in the property, he cannot recover the value of such interest, notwithstanding their breach of an agreement for possession thereof by the plaintiff.

APPEAL from a judgment of the Superior Court of Santa Clara County. James M. Seawell, Judge presiding.

The facts are stated in the opinion of the court.

Jackson Hatch, for Appellant.

William A. Bowden, for W. Ainsworth, Respondent.

S. G. Tompkins, for Phoenix Raisin Seeding and Packing Company, Respondent.

HARRISON, J.—Action in trover for the conversion of ten tons of prunes, alleged to be of the value of seven hundred dollars.

The plaintiff bases its right of recovery upon a certain contract between it and the defendant Ainsworth, by the terms of which Ainsworth, who was the owner of a tract of land, upon which the prunes were then growing, "sold and transferred to plaintiff an undivided interest, equal to two per cent, in his interest or ownership in or to said prunes, and agreed to cultivate and care for said prunes, at his own expense, and to cure the same to the satisfaction of plaintiff's inspector, and as soon as the same were so cured to deliver the whole thereof to plaintiff at the packing-house" in San Jose. The complaint further alleges, that after the execution of said agreement Ainsworth picked said prunes and cured the same to the satisfaction of the plaintiff's inspector, and "for the purpose and with the design of preventing plaintiff coming into possession of said prunes under said contract," without the knowledge or consent of the plaintiff delivered the same into the possession of his co-defendant, who received them with knowledge of the aforesaid contract with the plaintiff, and that the defendants then and there converted and appropriated said prunes to their own use, for which the plaintiff prays judgment for the sum of seven hundred dollars, the value of said prunes, as its damages. The defendants severally demurred to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, and also upon the ground that the court has no jurisdiction of the subject-matter of said action. The demurrer was sustained, and the plaintiff declining to amend, judgment was entered in favor of the defendants and dismissing the action. Plaintiff has appealed.

The rights of the plaintiff are to be measured by the terms of its contract with Ainsworth. His co-defendant is not a party to that contract, but as it is alleged that the prunes were delivered to him with full knowledge of its terms, it may be assumed that he stands in the same position as Ainsworth. It is not necessary to define the relation which was created by the contract between the plaintiff and Ainsworth. The plaintiff has assumed, in its complaint, that by virtue of the contract it was entitled to the possession of the whole crop of prunes raised by Ainsworth, and it is only upon such theory that it can maintain an action against the defendants for their conversion.

The general rule in regard to the measure of damages for

the conversion of goods when the plaintiff is the general owner, or is accountable over to another for the goods, is their value at the time of conversion; but if the plaintiff has only a special interest or limited property in the goods, he can recover from the owner of the remaining interest, or from one claiming under such residuary owner, only to the extent of his interest therein. The amount of damages which he is entitled to recover is such as will indemnify him for the loss he has sustained in not obtaining the possession of the goods. (Sutherland on Damages, sec. 1136; *Benjamin v. Strempfle*, 13 Ill. 466; *Sheldon v. Southern Express Co.*, 48 Ga. 625; *Burk v. Webb*, 32 Mich. 173; *Fowler v. Gilman*, 13 Met. 267; *King v. Bangs*, 120 Mass. 514; *White v. Allen*, 133 Mass. 423.) In *Chinery v. Viall*, 5 Hurl. & N. 288, the plaintiff had bought a certain number of sheep from the defendant, on credit, and had left some of them with him to be delivered at a future day. These were sold by the defendant while they were in his possession, and in an action of trover for their conversion the court held that the plaintiff could recover no more than the real damage which he had sustained, which would be the value of the sheep at the time of their conversion, less the amount which he had agreed to pay for them,—illustrating the rule by several instances in which the measure of damages is the actual damage sustained by the plaintiff, and not the value of the goods converted. Under the rule of the common law, a chattel mortgage vested the title to the mortgaged property in the mortgagee, and gave him the right to its possession, but in an action against the mortgagor for the conversion of the property, the mortgagee could recover only the amount of his debt. (*Parish v. Wheeler*, 22 N. Y. 494; *West v. White*, 165 Mass. 258.)

By the terms of its agreement with Ainsworth, the interest of the plaintiff in the prunes was only two per cent of the crop. If Ainsworth had delivered the entire crop to the plaintiff in accordance with the terms of the contract, it would have been accountable to him for the remaining ninety-eight per cent, as the prunes should, from time to time, be sold. As the prunes were never delivered to the plaintiff, the provision in the contract giving to it a lien for whatever payments it might thereafter make for grading and packing and other services, never became operative, nor is any claim therefor made in the complaint. If the plaintiff should recover from the defendants herein the full value of the prunes, it would hold the whole of such amount in

excess of two per cent of such value for the use of the defendants, and be immediately liable to them therefor. To avoid circuity of action, it is the policy of the law that the rights of both parties shall be settled in one suit, by awarding to the plaintiff only the value of its interest in the property. The plaintiff will thereby be fully indemnified, and its right of recovery against the defendants is to be thus limited. (*Chamberlain v. Shaw*, 18 Pick. 278;¹ *Sheldon v. Southern Express Co.*, 48 Ga. 625.)

As under this rule the whole amount of damages to which the plaintiff is entitled by the terms of the contract would be only fourteen dollars, the action is not within the jurisdiction of the superior court.

The judgment is affirmed.

McFarland, J., Van Dyke, J., Garoutte, J., Beatty, C. J., and Henshaw, J., concurred.

[Sac. No. 781. Department Two.—November 6, 1901.]

WILLIAM S. MOSS, an Incompetent Person, by his Guardian, etc., Respondent, v. MARY ODELL, Appellant.

MORTGAGE—ACCOUNTING OF MORTGAGEE IN POSSESSION—RENTS AND PROFITS—SECURITY FOR FUTURE ADVANCES.—A mortgagee in possession is chargeable, upon an accounting with the mortgagor, for the rents and profits arising from the land mortgaged; and where the possession of the mortgagee was taken under a deed, and contemporaneous agreement expressly providing for the repayment of future advances with interest, it is immaterial that there was no actual indebtedness at the date of the mortgage.

ID.—MONEYS AND CHOSSES IN ACTION TURNED OVER TO MORTGAGEE—NOTE OF MORTGAGEE TO MORTGAGOR—PAYMENT—DECREE FOR ACCOUNTING.—Where it appears that the plaintiff, at the time of the mortgage, turned over notes, moneys, and choses in action to the mortgagee, who was the sister of the mortgagor, in whom he had great confidence, such notes, moneys, and choses in action were properly included in the decree for the accounting; and the defendant cannot complain that one of the notes so included was a note given by the mortgagee to the mortgagor, and that it should

not be included because possession thereof was *prima facie* evidence of payment. The mortgagee, upon the accounting, may show his right to the note; and it will be time enough to complain when the mortgagee is finally adjudged responsible to the mortgagor for the amount of such note.

APPEAL from a judgment of the Superior Court of San Joaquin County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

Louttit & Middlecoff, for Appellant.

Budd & Thompson, and J. G. Swinnerton, for Respondent.

HENSHAW, J.—Plaintiff, an incompetent person, by his guardian, sued defendant, his sister, in an action for accounting, and for cause of action alleged that he had executed to her a mortgage on land which he owned, the mortgage being to secure such advances as defendant might make to plaintiff, and to secure the repayment of such taxes as defendant might pay upon the land; that at the same time, and as part of the same transaction, and as security for such advances, plaintiff turned over to defendant certain notes, moneys, and choses in action, in value from three thousand to five thousand dollars; that plaintiff, during all the times of these transactions, was an incompetent person, and had the utmost faith and confidence in his sister. He did not know how much money had been advanced by his sister to him, and expended and laid out upon his account, and on account of the land, and offering to pay all that was justly due to her, prayed for an accounting in which should be included the value of the choses in action so made over to her, and all the rents, issues, and profits of the land, into the possession of which she had gone. Issue was joined upon these averments, and the court found that the writings between the parties—which consisted, first, of a deed, and second, of a cotemporaneous agreement to reconvey upon repayment of the moneys advanced, with interest, and the taxes which might have been paid—constituted a mortgage; found that plaintiff had turned over to defendant certain choses in action, but that they were not pledged with her as part of the mortgage transaction; found that plaintiff was not incompetent during the times pleaded, but had become so only at a date shortly before the commencement of this action;

and decreed that an accounting should be taken of the transactions between the parties, covering the matters and things above set forth. From this decree defendant appeals. The transaction between the parties touching the land was, upon abundant evidence, found by the court to have been a mortgage. The action by the plaintiff was within four years from the maturity of the mortgage, and was not barred by the statute of limitations. Defendant thus became a mortgagee in possession, and in an accounting between the parties was properly chargeable with the rents and profits arising from the land. It matters not that there was no indebtedness from plaintiff to defendant at the time the mortgage was given. The mortgage clearly provides, in its terms, that it is security for future advances. One of the choses in action was a promissory note given by defendant to plaintiff, and in turn made over by plaintiff to defendant. Defendant objects that the possession of the promissory note was *prima facie* evidence of her payment of it, and that the court erred, therefore, in ordering that the note should be taken into consideration in the accounting. So far as the nature of the transactions can be gathered from the findings, it may be that the note was merely deposited by the plaintiff with his sister for safe-keeping, or made over to her as admittedly he made over certain other choses in action. Upon the accounting it may be established that defendant is in fact the owner of the note. It will be time enough for defendant to complain when she shall have been adjudged finally to be responsible for the amount of it.

The judgment appealed from is affirmed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 1845. In Bank.—November 6, 1901.]

BRIDGET FEENEY, Appellant, v. H. G. HINCKLEY,
Respondent; and W. WHITE, Co-defendant.

**ACTION UPON JUDGMENT—ACCRUAL OF CAUSE OF ACTION—FINALITY—
STATUTE OF LIMITATIONS.**—A cause of action upon a judgment does not accrue until the judgment becomes final, and admissible in evidence. The statute of limitations does not begin to run against an action upon the judgment from the date of its entry, but only after the lapse of the period within which an appeal might be taken from the judgment, if none is taken therefrom, or after the final determination following an appeal so taken.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

B. McFadden, for Appellant.

Cotton & Cotton, and William H. H. Hart, for H. G. Hinckley, Respondent.

HENSHAW, J.—The action was brought to recover an unpaid balance due upon a judgment. It was commenced more than five years and less than six years after the entry of the judgment. This fact appearing upon the face of the complaint, defendant urged by demurrer that the cause of action was barred by section 336 of the Code of Civil Procedure, which provides that an action upon a judgment or decree must be brought within five years. The court sustained the demurrer, and entered judgment accordingly, from which judgment this appeal is prosecuted. At the time of the entry of the judgment sued upon, the law permitted one year during which the losing party might prosecute his appeal. Upon this state of facts the question presented is, When does the five-years' statute of limitations barring action upon a judgment commence to run,—from the date of the entry of the judgment, or from the date when the judgment has become a final determination of the controverted matters between the parties litigant? It is apparent at once that the statute requires construction, and that something must be read into it by way of interpretation. If the five years commenced to run from the date of entry, the demurrer was properly sustained. If, however, it com-

menced to run only when the judgment became a finality, when the rights of the parties were fixed by it, when it was admissible in evidence for or against either of them,—when, in short, a cause of action upon it had accrued,—then, clearly, in case an appeal from the judgment be taken, the five years cannot be said to have commenced to run until final determination following such appeal, or in the event that no appeal be taken, then only when the time within which such an appeal might be taken has fully elapsed.

Section 312 of the Code of Civil Procedure declares: "Civil actions can only be commenced within the periods prescribed in this title, *after the cause of action shall have accrued*, except where, in special cases, a different limitation is prescribed by statute." "A judgment is the final determination of the parties in an action or proceeding." (Code Civ. Proc., sec 577.) "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." (Code Civ. Proc., sec. 1049.) An action will not lie upon a judgment until it has become final. Until that time has arrived, no cause of action upon the judgment has accrued. (*Hills v. Sherwood*, 33 Cal. 474, 479.) In *Gilmore v. American C. I. Co.*, 65 Cal. 63, it is said: "Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it." And in the same case (*Gilmore v. American C. I. Co.*, 67 Cal. 366) it is said that the judgment became final only, in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed, and no motion was made and no appeal taken. In *Harris v. Barnhart*, 97 Cal. 546, it is said: "Until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under section 1049 of the Code of Civil Procedure, to be deemed as pending." To like effect are *Naftzger v. Gregg*, 99 Cal. 83,¹ and *In re Blythe*, 99 Cal. 472, in which latter case it is held: "That a judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and if the

¹ 37 Am. St. Rep. 23.

action in which the judgment is rendered is still pending, necessarily the judgment is not final." And therein is quoted with approval the language of the supreme court of New York in *Webb v. Buckelew*, 82 N. Y. 560, where it is said: "Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and incomplete, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the question at issue; and whenever it fails to fix and determine the rights of the parties, whenever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing." In *Story v. Story*, 100 Cal. 41, the trial court had admitted in evidence a judgment rendered in another action before the time for an appeal therefrom had expired, and this court, in reversing the judgment, said: "At the time that the court made its decision in the present case, the other action was still pending (Code Civ. Proc., sec. 1049), and while that action was so pending the judgment rendered therein could not be a bar to the prosecution of the present action." In *Brown v. Campbell*, 100 Cal. 635,¹ the court expounds the doctrine that *res adjudicata* applies only to final judgments, and proceeds: "The time to appeal from the judgment of November 24th had not expired when the cross-complaint was filed, and although no appeal had been taken therefrom, the action was still pending, within the legal meaning of the term, and the judgment was not a bar to a retrial of the matters alleged in the cross-complaint, under the rule announced by this court." (Citing cases.) While, as pointed out by Mr. Justice Harrison in his concurring opinion in *Naftzger v. Gregg*, 99 Cal. 83,² and in *Cook v. Rice*, 91 Cal. 664, cases may arise in which, for certain purposes, a judgment may be evidentiary before it has become final, these cases are exceptional, and the general rule prevailing in this state is that which has been so frequently declared. In other cases, such as *Trenouth v. Farrington*, 54 Cal. 273, where may be found *dicta* apparently declaring that the statute of limitations begins to run from the entry of the judgment, it will be noted that the present question was not before the court, the argument there urged being only to the effect that the statute of limitations began to run from the date of the rendition, and

¹ 38 Am. St. Rep. 314.² 37 Am. St. Rep. 23.

not from the date of entry. The actions were one and all within the five-years' limitation if time began to run from the date of entry, but were barred if it was calculated from the date of rendition. The decisions, therefore, are not directed to the particular matter here in controversy.

It is the established rule and doctrine, then, that action will lie only upon a final judgment, and that in the generality of cases only such a judgment is admissible in evidence. If the five-years' statute of limitations is to commence to run from the date of the entry of judgment, the anomalous condition is presented of a *right* of action which may be barred before the *cause* of action has accrued. In every case, even where there was no appeal, it would mean that the period was shortened by construction from five years to four, and where an appeal had actually been taken, it might readily happen that the five years had elapsed before final determination upon appeal, and the statute of limitations would have barred the action before the right to commence it had ever rested with the prevailing party. It is of the essence of a statute of limitations that it acts upon a party *sui juris*, to whom a complete cause of action has accrued, and such is the provision of section 312 of the Code of Civil Procedure, above quoted. When one is under disability, or when from any cause the right of action is not perfect, the statute does not begin to run. The construction contended for by respondent would, as has been said, be an absolute reversal of and exception to this general salutary rule. Far more in harmony with the spirit of our law and with our adjudications upon this subject is the interpretation which holds that the statute begins to run only when the right of action has accrued, and this, as has been said and shown, is after final determination on appeal, in the event that an appeal has been taken, or after passage of the time in which an appeal might be taken, in the event that none has been.

For the foregoing reasons the judgment appealed from is reversed and the cause remanded to the trial court, with directions to overrule the demurrer.

Beatty, C. J., Temple, J., and Garoutte, J., concurred.

Harrison, J., and McFarland, J., dissented.

[S. F. No. 2659. Department One.—November 8, 1901.]

THE PACIFIC COAST COMPANY, Appellant, v. ASA R.
WELLS, Auditor, etc., Respondent.

MANDAMUS TO AUDITOR—TAXES REFUNDED BY SUPERVISORS—MISTAKE IN LISTING CREDITS—ASSESSOR'S CHANGE OF TRUE BALANCE.—*Mandamus* will lie to compel the auditor to audit and approve a claim properly allowed by the supervisors, upon the assessor's recommendation, for the refunding of a sum of taxes erroneously paid, on account of a clerical mistake of the taxpayers' book-keeper in listing credits in an excessive sum of one hundred thousand dollars, which led the assessor to change a truly stated balance of credits over debts, so as to increase the balance by that excessive sum, without notice to the taxpayer, thus exacting taxes upon said sum which were not in fact due.

ID.—EFFECT OF VOLUNTARY PAYMENT—POWER OF SUPERVISORS TO REFUND TAXES—CONSTRUCTION OF CODE.—The fact that the taxes paid upon said excessive sum of one hundred thousand dollars were voluntarily paid, without protest by the taxpayer, cannot affect the power and duty of the supervisors to refund such taxes as having been erroneously or illegally collected, under the provisions of section 3804 of the Political Code. That section is remedial, and should be liberally construed to carry out its intent and object, to prevent the inequitable retention of money by the county, which was improperly collected, and to which the county has no right.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are state in the opinion.

Webb & Espey, for Appellant.

Lloyd & Wood, for Respondent.

COOPER, C.—The court below sustained a demurrer to the verified petition for a writ of mandate herein, and refused to allow the petitioner to amend. Judgment was thereupon entered in favor of defendant. This appeal is from the judgment. The facts are stated in the petition, substantially, as follows: In the month of March, 1900, plaintiff furnished to the assessor of the city and county of San Francisco a verified statement, purporting to set forth all the property owned by it on the first Monday in March, 1900. In said statement, in the column headed "List of Personal Property," appeared the following items:—

"Credits or solvent notes and accounts due me from others, unsecured by mortgage or deed of trust, and not including accounts due from savings and loan corporations or to my credit there on account of moneys on general deposit, \$323,776.51.

"Less debts or accounts I owe to *bona fide* residents of this state, unsecured by mortgage or deed of trust (not to include any liability as an indorser, guarantor, or bondsman), \$214,587.37.

"Balance assessable, \$9,198."

It will be observed that the difference between the amount of debits and credits is \$109,189, and not \$9,189. The assessor, believing that a mistake had been made in the process of subtraction, drew his pen through the figures \$9,189 and wrote over them "\$109,189." The effect of increasing the balance of credits assessable from \$9,189 to \$109,189 was to charge the plaintiff with \$1,625 more in taxes for the year than it would have been required to pay if the balance of credits assessable were only \$9,189.

As a matter of fact, plaintiff did not, at the date mentioned, own solvent credits amounting to \$323,776.51. The entire amount of such credits was only \$223,776.51, and the sum of \$9,189 would have been all that plaintiff should have been assessed for, if a correct statement had been made. The mistake occurred through a clerical error of plaintiff's book-keeper, when preparing the statement.

The error occurred in the verified statement given to the assessor by reason of the fact that petitioner's book-keeper wrote the figure 3 instead of the figure 2 in the statement of the total amount of solvent credits. The footing as given in the statement to the assessor of the balance of credits assessable was correct,—\$9,189. And the total footing as given to the assessor of property assessable to petitioner was correctly given,—\$44,029. The assessor, without notice in any manner to petitioner, drew his pen through the footings and added \$100,000 more to the total of credits, making the assessable credits \$109,189, and the total assessment of petitioner \$149,029. The mistake made by the petitioner, and the addition made to his assessment by the assessor, first came to its notice on or about the 15th of November, 1900, when its tax-bill was received from the tax-collector. There-

upon it voluntarily paid to the tax-collector the full amount of the taxes charged, amounting to \$1,625 more than was justly due by it, and that amount more than it would have been called upon to pay except for the change in the totals so made by the assessor.

Upon the attention of the assessor being called to the matter, he recommended that the said taxes so collected be refunded. Thereupon petitioner made proper application to the board of supervisors for an order directing said sum to be refunded and that body, on the nineteenth day of December, 1900, passed a resolution, directing the auditor and treasurer, respectively, to audit and pay out of the general fund to petitioner the said sum of \$1,625. The resolution of the said board recited that said sum was for "taxes overpaid on an erroneous assessment of personal property, and that by a clerical error of the company's book-keeper, said assessment was overvalued in the sum of \$100,000."

The resolution or order so passed was approved by the mayor on the same day. Petitioner has made the proper demand upon the respondent, as auditor, for his approval and allowance of said claim, but respondent refuses to allow and approve the same.

We think the facts stated entitled the petitioner to the writ, and that the court erred in sustaining the demurrer. The money so paid to the county as taxes was not due from petitioner. It was the amount of taxes upon an assessment of one hundred thousand dollars, on property that had no existence. It was an assessment made by the assessor in changing the footings of petitioner's assessment. It was paid without consideration, and the city and county have no right to it. Petitioner has paid all its just taxes, and this sum in addition. No doubt, if the assessor had called the attention of petitioner to the statement it had given in, the footings would never have been changed. It was a clerical error that could easily have been explained. When the attention of the assessor was called to it, he recommended that the mistake be corrected. The board of supervisors, representing the county, after investigation, made an order to correct it. Shall the city and county keep the \$1,625 regardless of all this? It surely would be in violation of honesty and fair dealing for them to do so. Is it in violation of law for them to refund it? We think not. The board were authorized to order the money refunded, under section 3804 of the

Political Code, which provides: "Any taxes, penalties, and costs paid more than once, or erroneously or illegally collected, may, by the order of the board of supervisors, be refunded by the county treasurer." This being a remedial statute, it should be liberally construed, so as to carry out its intent and object. And it is not without judicial construction.

In *Hayes v. County of Los Angeles*, 99 Cal. 74, it appeared that by some mistake real estate had been twice assessed. The owner had been assessed with the property and had paid the taxes. It had also been assessed to a third party, and the taxes so assessed to such third party were not paid. It was accordingly advertised and sold for delinquent taxes. The purchaser at the tax sale paid the delinquent taxes and costs, and afterwards sold and assigned the certificate of purchase. Upon the assignee discovering that the sale was on a double assessment, and void, he applied to the board of supervisors for an order refunding the money.

The board refused the order, and this court held that the order should have been made, and that the word "may" meant the same as "shall." In the opinion this language is used: "It had often occurred, prior to the amendment to the code above quoted, that, by accident or oversight, property was twice assessed and the taxes twice collected. Yet the obstacles in the way of a recovery of the taxes thus improperly collected were so numerous and perplexing, that the remedy for a recovery was scarcely worth pursuing. That the object of the statute was to obviate these difficulties, and provide a means for the ~~recovery~~ of moneys collected by mistake, and to which the county and state have neither a moral nor legal right, is apparent. . . . Section 3804 was enacted to do justice in a class of cases where, but for its provisions, the application of the doctrine of *caveat emptor* would work a hardship to citizens who had paid money which it was inequitable for the county to retain."

In this case it is clear that petitioner has paid money which it is inequitable for the city and county to retain.

In a late case, the supreme court of New York had under consideration the construction of a similar statute of that state, where an application had been made to the board of supervisors to refund moneys paid for the purpose of removing a cloud upon title, caused by sales under illegal or erroneous assessments. The county court had affirmed the action

of the board of supervisors denying the application upon the ground that the taxes were voluntarily paid. The appellate court reversed the case, and held that the order should have been made. In the opinion it is said: "This is not a common-law action to recover an illegal tax paid under duress in law or in fact, nor is it an action in equity to remove a cloud upon title. . . . This is a proceeding under a special statute, which confers power upon the supervisors to refund to any person the amount of an illegal tax collected from him. . . . This proceeding was not governed by the technical rules that apply to actions at law to recover money voluntarily paid, or to suits in equity to remove a cloud upon title. The statute furnishes a convenient and summary remedy which enables the county to restore, without litigation or expense, what it ought not to retain, and a citizen who has paid an illegal tax, without waiting to have his property advertised and sold, to obtain justice. The benefits of the statute are not confined to parties who have paid an illegal tax upon compulsion, but extend to all persons who have paid taxes that they were not legally bound to pay." (*Matter of Adams v. Monroe County Supervisors*, 154 N. Y. 625.)

The same rule was laid down by the appellate court of Indiana (*Du Bois v. Lake County etc.*, 10 Ind. App. 348) in construing a similar statute of that state. The court, in the opinion, said: "The fact that the taxes were voluntarily paid constitutes no defense under the statute cited. When the auditor added to the assessment, and the taxes, as thus increased by the additions, were carried out on the duplicate and paid, the increased taxes are recoverable from the county." (See also *People v. Supervisors of Otsego County*, 51 N. Y. 401, and *People v. Supervisors of Madison County*, 51 N. Y. 443.)

It is claimed that the judgment of the lower court is supported by the cases of *Phelan v. San Francisco*, 120 Cal. 1, and *Rooney v. Snow*, 131 Cal. 51. Neither of the cases contains anything in conflict with what has here been said. The first case was an action to recover taxes paid under protest. It was held that the taxes were voluntarily paid, and not under duress. The section of the Political Code was not relied upon nor mentioned in the decision. In the latter case the appellant had voluntarily paid a license as a retail liquor dealer to the city of Oakland for retailing liquors at a place afterwards discovered to be outside the city limits. The order appropriating moneys to repay the amount so paid out for

license was made by the city council. It does not appear what authority was given the city council by the charter in such cases, and the opinion states that the petition before the board did not show how or why the money was erroneously collected. The opinion is based upon the principle that the voluntary payment of taxes under protest does not authorize the recovery, unless the payment was made in order to protect person or property, and in conclusion it was said, "The city is not responsible in the matter, nor required to refund the money." The action was not brought under section 3804 of the Political Code, and no reference is made to the section in the opinion. It is said by respondent that it would be a dangerous and pernicious doctrine "to hold that a taxpayer may, whenever he considers that he has made a mistake in his statement, after making a voluntary payment of the amount claimed, apply to the board of supervisors for a return of the amount which he deems he has overpaid." The doctrine has never been laid down in so broad terms as the imaginary case stated. Undoubtedly, the rule would not apply to correct an assessment where the taxpayer has merely changed his opinion as to the value of his property. But in a case like this, where it is patent that a mistake was made, and that one hundred thousand dollars was added by the assessor to the total assessment as stated by the taxpayer, it is not a dangerous doctrine to give back to the taxpayer that to which the county has no right.

It follows that the judgment should be reversed and the court below directed to overrule the demurrer to the petition.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the court below directed to overrule the demurrer to the petition.

Harrison, J., Garoutte, J., Van Dyke, J.

[Sac. No. 843. Department One.—November 9, 1901.]

RECLAMATION DISTRICT No. 551, Respondent, v.
COUNTY OF SACRAMENTO, Appellant.

TAXATION—PROPERTY OF RECLAMATION DISTRICT—STATE AGENCY—PROPERTY OF STATE—STATE AND COUNTY TAXES.—A reclamation district is a public agency of the state; and property acquired thereby, which is indispensable to the execution of its objects, is public property of the state, within the meaning of the constitution, and is exempt from state and county taxes as such.

ID.—CONSTRUCTION OF POLITICAL CODE—STATE NOT BOUND BY GENERAL WORDS.—The state is not bound by general words in the Political Code upon the subject of taxation, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it.

APPEAL from a judgment of the Superior Court of Sacramento County. Joseph W. Hughes, Judge.

The facts are stated in the opinion.

C. W. Baker, District Attorney, for Appellant

Shinn & Catlin, for Respondent.

CHIPMAN, C.—Action to recover money paid under protest for taxes levied and assessed by defendant upon the property of plaintiff. A general demurrer to the complaint was overruled, and defendant declining to answer, plaintiff had judgment, from which defendant appeals. Plaintiff is a reclamation district duly organized for the purpose of reclaiming certain swamp and overflowed lands. It is alleged in the complaint that plaintiff is the owner of seven acres of land (describing it); "that said land was purchased and paid for by plaintiff with money procured by an assessment levied upon the lands in said district; that for the purpose of reclaiming and draining the swamp and overflowed lands in said district, it is necessary to maintain a pumping plant and canals to convey the water thereto; that, in 1894, plaintiff purchased said land, and constructed thereon, at great expense, a pumping plant for said purposes, and excavated canals across said lands to convey the water to said pumps, and at all times has used and now uses said pumps and canals for the purpose of draining the water from said

swamp and overflowed lands; that said land is necessary to plaintiff for said purposes."

The demurrer concedes these allegations to be true. The sole question presented is, whether property acquired by a reclamation district as necessary and indispensable to the execution of its objects is subject to taxation for state and county purposes. Section 1 of article XIII of the constitution declares that "all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, . . . provided . . . [that] property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation."

Appellant's contention is, that a reclamation district is not a municipal corporation, and hence its property does not fall within the exceptions of the above provision of the constitution. Plaintiff was organized under the provisions of sections 3446 et seq. of the Political Code. It was held in *People v. Reclamation District No. 551*, 117 Cal. 114, that these districts are not municipal corporations, as that term is used in the constitution, nor do they come within the class of corporations defined by section 284 of the Civil Code. It was said: "They are special organizations, formed to perform certain work, which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated." Again: "They are public agencies, which would cease to exist when the policy of the state has changed so that they are no longer required, or when there is no further function for them to perform."

Referring to Mr. Dillon's designation of them as quasi-corporations, it was said: "Perhaps it would have been more accurate to say that they are not corporations at all." *Hensley v. Reclamation District No. 556*, 121 Cal. 96, was an action against the district for damages sounding in tort. It was held that the action would not lie; that these districts "have only such powers and have only such liabilities as are prescribed by the law which creates them. . . . Their characters are determined by the provisions of the Political Code, from which they derive whatever legal existence they have. The law which creates them does not anywhere provide that they may be sued." It was said that a judgment could not be enforced against a district, for "it has no property out of which a judgment could be satisfied. It is, in its essential char-

acter, a mere agency. . . . Neither its trustees nor its commissioners could be compelled by *mandamus* to levy assessments to pay such a judgment as is prayed for in the case at bar."

The swamp and overflowed lands of this state require different methods of reclamation. In some instances the land may be entirely reclaimed by a series of drainage ditches through and over the land reclaimed, draining by gravity the surplus waters into some river or other outlet. In other instances the entire body of land is inclosed by embankments to exclude the overflow of creeks and rivers, and the seepage water and rainfall is removed by pumping apparatus. In other cases, both drainage by ditches and by pumping is resorted to. Section 3471 of the Political Code authorizes the trustees to acquire by purchase or condemnation "rights of way for canals, drains, embankments, and other work necessary to the reclamation, and may take materials for the construction, maintenance, and repair thereof, from lands outside of as well as within the limits of the district; and if the trustees cannot procure the consent of the owner of the lands or material needed, they . . . may proceed" to condemn. The cost of any such acquisition would be a charge upon the land of the district, to be paid as provided by the law. But when acquired, these works constitute a part of the system of reclamation called into existence by state agency in furtherance of the trust under which the grant of swamp and overflowed lands was made to the state. The history of this grant, and the nature and character of this trust, have been often referred to in decisions of this court, and were fully stated in *County of Kings v. County of Tulare*, 119 Cal. 509. It is not necessary to hold this property, thus acquired, to be the property of a municipal corporation, in order to make it exempt from taxation. It would be sufficient to hold that it is public property of the state, within the meaning of the constitution. The whole scheme of reclamation originates with the state, and is carried to a conclusion by agents of the state,—the district, as we have already seen, being a public agency,—in furtherance of public policy. The property mentioned in section 3471 of the Political Code is public property, acquired by the agents of the state, for state purposes, and we think is exempt from taxation, as such. There is no power given the district to levy assessments, except "for the works of reclamation." (*Hensley v. Reclamation District No. 556*, 121 Cal. 96.) The trustees have no money which they can apply to

pay county and state taxes levied and assessed upon the works of the district, and they have no power to levy assessments to raise money for any such purpose. The land belonging to the purchasers from the state is enhanced in value by its reclamation, and this enhanced value is presumably carried into the assessment roll, and is taxed against the owner of the land. To allow the county to assess the works—i. e., the canals, ditches, drains, embankments, pumping plants, etc.,—for general taxation purposes might lead to the sale of the works of reclamation and the ultimate destruction or abandonment of an important undertaking of the state. But, aside from this view of the matter, the county assessed this property, not by virtue of the constitution, but under the provisions of the Political Code relating to the assessment of property for taxation. (Pol. Code, secs. 3307 et seq.)

The principle of construction was stated in *Mayrhofer v. Board of Education*, 89 Cal. 110,¹ to be, "that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it." This principle has been applied, and the *Mayrhofer* case has been approved in a variety of cases, and we think, should rule the present case. (*Bates v. County of Santa Barbara*, 90 Cal. 543; *Whittaker v. County of Tuolumne*, 96 Cal. 100; *Skelly v. School District*, 103 Cal. 652; *Smith v. Broderick*, 107 Cal. 644;² *County of Colusa v. County of Glenn*, 117 Cal. 434; *Russ & Sons v. Crichton*, 117 Cal. 695; *Witter v. Mission School District*, 121 Cal. 350;³ *Estate of Royer*, 123 Cal. 614; *Savings etc. Society v. San Francisco*, 131 Cal. 356.)

The judgment should be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

¹ 23 Am. St. Rep. 451.

² 66 Am. St. Rep. 33.

³ 48 Am. St. Rep. 167.

[S. F. No. 2929. In Bank.—November 8, 1901.]

A. BOYER, Petitioner, v. A. G. BURNETT, Judge of the Superior Court of Sonoma County, et al., Respondents.

MANDAMUS—SETTLEMENT OF BILL OF EXCEPTIONS—AGREED CONTINUANCE OF HEARING—PRESENTATION OF BILL AND AMENDMENTS.—Where the hearing of the settlement of a proposed bill of exceptions and the proposed amendments thereto, which were rejected, was duly noticed, agreed continuances of the hearing of such settlement, by stipulation of the parties, were by implication, continuances of the presentation of the bill and amendments to the judge; and where the judge refused at the hearing to settle the bill, because presented only at the hearing, and not within the ten days first noticed, *mandamus* will lie to compel such settlement.

PETITION in the Supreme Court for writ of mandate to the Judge of the Superior Court of Sonoma County. A. G. Burnett, Judge.

The facts are stated in the opinion of the court.

James P. Sweeney, for Petitioner.

Fox & Gray, and J. M. Thompson, for Respondents.

BEATTY, C. J.—This is a petition for a writ of mandate to the judge of the superior court, requiring him to settle a bill of exceptions.

Judgment having been given against the petitioner in an action of ejectment, he in due time served his proposed bill of exceptions, to which the defendants in the action proposed and served amendments on June 3, 1901. On June 5th, petitioner served notice that he rejected the proposed amendments, and that on June 12th he would present the same, with his proposed bill, to the judge for settlement. On June 11th, the parties stipulated in writing to continue the hearing of the application to settle the bill to June 19th, and this time was afterwards extended by several renewals of the same stipulation to September 3d. On that day the matter was brought to a hearing before the respondent, who refused to settle the bill, because it had not been presented to him within ten days after service of the proposed amendments, his opinion being that such presentation was not waived by

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the stipulations continuing the hearing, and that it was a jurisdictional prerequisite to his right to act.

We think this was an erroneous conclusion. The parties had a right to continue the hearing by stipulation, and the continuance of the hearing was, by implication, a continuance of the presentation of the bill and amendments to the judge. Nothing would have been accomplished by showing him the papers before the day agreed upon by the parties for the settlement, and no harm was occasioned by the failure to present them in advance of the hearing.

It is ordered that a peremptory writ issue as prayed.

McFarland, J., Temple, J., Van Dyke, J., Harrison, J.

[S. F. No. 2636. Department One.—November 9, 1901.]

AMELIA SCHNEIDER, Respondent, v. MARKET STREET RAILWAY COMPANY, Appellant.

NEW TRIAL—NOTICE—STATEMENT—MOTION UPON MINUTES—APPEAL FROM ORDER—PRESUMPTIONS.—The statement, whether made on motion for a new trial, or after a motion made on the minutes of the court, need not embody the notice of the motion, or its contents; and the presumption upon appeal in either case is, that the notice was duly given, and that the specifications contained in the statement conform to those in the notice. Where the motion was made upon the minutes of the court, it will also be presumed upon appeal, without a formal statement to that effect, that the specifications set out in the statement were in fact argued, as well as contained in the notice.

ACTION FOR DEATH—COLLISION OF STREET-CAR WITH FOOTMAN—SPECIFICATIONS IN STATEMENT.—In an action for death, caused by the alleged collision of a street-car with a footman at the intersection of two streets, a specification, in the statement of insufficiency of evidence, tending to show that the deceased "was struck by the car while making an attempt to pass over East Street, at a public crossing," the connection of which shows that it may be construed as specifying merely that there was no public crossing where the accident occurred, does not support the contention that the defendant was killed by slipping and falling upon the pavement without actual contact with the car, and that the evidence was insufficient

to warrant the jury in finding that the deceased was in fact struck by the car.

ID.—NEGLIGENCE OF STREET-RAILWAY COMPANY—EXCESSIVE SPEED—ABSENCE OF WARNING REQUIRED BY ORDINANCE.—Where there was evidence from which the jury might infer that the street-car was crossing the intersection of its line with another street, at an excessive rate of speed, when it collided with the deceased, and where it affirmatively appears as an established fact that no bell was rung or gong sounded as the car approached the limit of twenty-five feet from the intersecting street, as required by a city ordinance set out in the complaint, the negligence of the street-railway company is sufficiently established to support the verdict for the plaintiff.

ID.—CONSTRUCTION OF ORDINANCE—WARNING AT "STREET CROSSING"—PROTECTION OF FOOT-PASSENGERS—STREETS TERMINATING AT INTERSECTION.—A city ordinance requiring a warning to be given by a street-car when approaching a "street crossing" is designed for the protection of foot-passengers, and the reason of the rule applies equally to all intersecting streets across which streams of foot-passengers pass. Such ordinance is to be construed as applying to all intersecting streets, including those which terminate at the point of intersection with the street upon which the cars pass.

ID.—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF—BURDEN OF PROOF—QUESTION FOR JURY.—The burden of proof is upon the defendant to establish the contributory negligence of the plaintiffs and such contributory negligence is a question of fact for the jury, whose verdict thereon is conclusive, where the existence of such contributory negligence, and that it contributed proximately to the injury, does not appear to follow necessarily and irresistibly from the undisputed facts, so as to justify the court in disturbing the verdict as matter of law.

ID.—CROSSING TRACK IN FRONT OF STREET-CAR—ORDINARY PRUDENCE.—Ordinary prudence is required on the part of all persons crossing the track in front of a moving car; but the question, what is ordinary prudence is widely different in a case where the crossing is in front of a street-car, from that where it is in front of an ordinary steam-railroad. Held, upon the facts of this case, that it cannot be said, as matter of law, that the action of the deceased in crossing the street in front of the street-car was the proximate cause of the injury, or that it necessarily constituted negligence on his part.

ID.—PLAINTIFF SUDDENLY PUT IN PERIL—UNWISE CHOICE.—Where the plaintiff was suddenly put in peril by the negligence of the defendant, without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence, and even if, in his bewilderment, he runs into the danger he fears, he is not at fault.

ID.—EVIDENCE—CONTACT OF CAR WITH DECEASED—IMPEACHMENT OF WITNESS—QUESTION FOR JURY.—Where the motorman testified that he could not tell whether the car came in contact with the de-

ceased, he may be impeached by the evidence of witnesses in regard to statements by him to the contrary, which he denied upon cross-examination; and it is a question for the jury whether such statements were made by the witness, as testified by the impeaching witnesses.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion.

W. H. L. Barnes, for Appellant.

William J. Herrin, for Respondent.

SMITH, C.—Carl Richard Schneider was killed, in this city, at the junction of East and Pacific streets, by one of the defendant's street-cars, and this suit was brought by the plaintiff, his mother and sole heir, to recover damages for the killing. The case was tried by a jury, who found for the plaintiff in the sum of five thousand dollars, and judgment was entered accordingly. The defendant appeals from an order denying its motion for a new trial.

The motion was made on the minutes of the court, and it is objected that "there is nothing in the statement to indicate that a notice of motion was ever given, or if given, as to its contents." But it is not necessary that the statement should thus indicate. The presumption, in the absence of a showing to the contrary, is, that the notice was duly given, and that the specifications contained in the statement conform to those in the notice. (*Pico v. Cohn*, 78 Cal. 386, 387, and cases cited; 4 Notes on Cal. Rep. 482.) This rule applies equally, whether the order appealed from was made on a statement of the case or on the minutes of the court. (Code Civ. Proc., sec. 659, subds. 3, 4; sec. 661.) The requirements of the latter section that the statement shall contain only "the grounds argued before the court for a new trial" refer to the specifications of grounds mentioned in subdivision 4 of section 659, or such of them as are in fact argued; and when specifications are set out in the statement, it will be presumed, without a formal statement to that effect, that they were contained in the notice and that they were in fact argued. In the cases cited by respondent's counsel (*Leonard v. Shaw*, 114 Cal. 72, and *Sprigg v. Barber*,

122 Cal. 574), there were no specifications in the statement.

The points urged by the appellant are, insufficiency of the evidence to justify the verdict, and erroneous rulings of the court on questions of evidence, and in its instructions to the jury.

1. The accident occurred about half-past six in the evening. The deceased was crossing East Street, from the southern sidewalk of Pacific, and was killed in crossing the track in front of the car. He was seen momentarily by the motor-man as he emerged from the darkness into the stream of light thrown forward by the headlight of the car, and was next seen, on the car being stopped, lying on his face in the street, to the eastward of the track, and opposite or somewhat to the rear of the rear open end of the car,—his feet near the track, his head towards the bay. He was then in an unconscious and dying condition, the result of a fracture of the skull, with contusion and hemorrhage of the brain.

It is urged at length by the appellant's counsel that "these circumstances make it possible, if they do not lead to the conclusion, that the defendant was killed by slipping and falling upon the pavement without actual contact with the car," and in effect, that the jury was not justified in drawing a contrary inference. But the only specification on this point is, that there was no evidence tending to show that deceased "was struck by the car while making an attempt to pass over East Street, *at a public crossing*," which, taken in connection with the preceding specification, may be construed as specifying merely that there was no street crossing or public crossing at the place where the accident occurred. It will be unnecessary, therefore, to consider the sufficiency of the evidence to justify the jury in finding that the deceased was in fact struck by the car.

With regard to the defendant's negligence, the principal charges are that the rate of speed of the car, at the time of the accident, was in excess of the statutory limit of eight miles an hour (Civ. Code, sec. 501), and that no bell was rung or gong sounded on approaching Pacific Street, as required by the municipal ordinance set out in the complaint.

With regard to the rate of speed at which the car was going, the evidence is somewhat meager. There was testimony, on behalf of the plaintiff, that it was going very fast, and ac-

cording to one of the witnesses, "unusually fast," and "as fast as [he] ever saw a car going before"; but none of these witnesses could give the rate of speed. On behalf of the defendant, the motorman and conductor testified that the car was going at the rate of about four miles an hour; but the time consumed in arriving at the place of the accident, from the point of starting, as given by themselves, would indicate a rate of about six and a half miles an hour. The motorman also says that he "stopped the car within fifteen or eighteen feet," and that it would have required "no less than between thirty-five and fifty feet to stop a car going full speed," etc. But, according to his own testimony, the deceased, when first seen, was ten feet in front of the car, which was twenty-eight feet long, and, according to the testimony of one of the witnesses (Anderson), the deceased was found, on the stoppage of the car, about eight feet in rear of its rear end,—thus making the distance passed about forty-six feet, and indicating that the car was going, at least, at the full speed of eight miles per hour. But Anderson—who was familiar with the line—also testifies that "when [the cars] are going fast they can stop in fifteen or twenty or twenty-five feet to take passengers off and on"; from which the inference may be drawn that the car was going at more than full speed, or eight miles an hour; and if such an inference was drawn by the jury, we cannot say they were not justified in making it. (*Johnsen v. Oakland etc. Railway*, 127 Cal. 610, 611.) Though, possibly, it may be said, as was said by this court in a somewhat similar case, "that a verdict founded on such speed alone as constituting negligence on the part of appellant could hardly be sustained." (*Driscoll v. Cable Ry. Co.*, 97 Cal. 564, 565.¹)

It seems, however, to be an established fact in the case that no bell was rung or gong sounded on the car as it approached the limit of twenty-five feet from Pacific Street, as was required by the ordinance set out in the complaint. This fact is not contested by the appellant, but the contention is, in effect, that the junction of the two streets cannot be regarded as a "street crossing," and hence that the ordinance does not apply to it. But this contention, we think, cannot be admitted. The term used in the ordinance, according to its common use, includes all intersections of streets, and equally applies though one of them may terminate at the point of

intersection (see Webster's Dictionary, words "Cross" and "Crossing," and diagrams under former term); and the reason of the rule applies equally to all street crossings or intersections. For, where one street intersects another, there are always passing along the former, so to speak, two streams of foot-passengers approaching the latter, of which, the one diverges along and the other crosses the street approached; and this is equally true, whether the intersecting street passes beyond the other street or terminates in it. Hence the reason of the rule—which is the protection of foot-passengers crossing the street approached—will equally apply in both cases.

It remains to consider the question of alleged contributory negligence on the part of the plaintiff's decedent. In considering this, it is important to bear in mind that such negligence is a matter of defense, to be proved affirmatively by the defendant, and hence that the burden of proof is on him. (*Robinson v. Western Pacific R. R. Co.*, 48 Cal. 426; *McQuilken v. Central Pac. R. R. Co.*, 50 Cal. 8; *Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 334; *MacDougall v. Central Pac. R. R. Co.*, 63 Cal. 434; *Yik Hon v. Spring Valley Water Works*, 65 Cal. 620; *Magee v. North Pacific Coast R. R. Co.*, 78 Cal. 433;¹ *House v. Meyer*, 100 Cal. 593.) "In this state . . . it is sufficient for the plaintiff to show, in the first instance, that the injury resulted from the negligence of the defendant." (*Smith v. Occidental etc. Steamship Co.*, 99 Cal. 468; and see also *Shearman and Redfield on Negligence*, secs. 107-109, there cited.) Hence, to justify the court in disturbing the verdict, it must affirmatively appear, as a matter of law, "from the undisputed facts, judged of in the light of that common knowledge and experience of which the courts are bound to take judicial notice, that [the plaintiff] has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger" (*Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 52); and it is said (p. 54), "the evidence against the plaintiff should be so clear as to leave no room for doubt," and the facts such "that the inference is irresistible." (See also *Shearman and Redfield on Negligence*, secs. 55, 56.) It must also appear affirmatively, in the same conclusive way, that the negligence of the plaintiff was, in whole or in part, the proximate cause of the injury, or in other words, that it

¹ 12 Am. St. Rep. 69.

contributed to that effect. (*Smith v. Occidental etc. Steamship Co.*, 99 Cal. 468.) And with regard to the question of negligence, it is to be observed that it falls within the province of the jury not only to determine the facts constituting negligence, but also the question as to what would be the conduct "of a person of ordinary prudence" under similar circumstance,—which, commonly, is a question of fact, not of law. (*Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 50; *Walgren v. Market Street Ry. Co.*, 132 Cal. 656.) In general, all these questions are for the jury, whose verdict in favor of the plaintiff must be regarded as conclusive, unless the validity of the defense, both as to the existence of the negligence, and its effect as contributing proximately to the injury, follows necessarily from the undisputed facts. Hence, as intimated in *Smith v. Occidental etc. Steamship Co.*, 99 Cal. 468, it is only in rare cases that a verdict for the plaintiff can be disturbed on this ground. In this, the case is to be distinguished from a case where the ground of the objection is insufficiency of the evidence to show negligence on the part of defendant, where the affirmative of the issue is on the plaintiff, and where, consequently, there must be satisfactory evidence of such negligence (Code Civ. Proc., secs. 1935, 2061, subd. 5); while in cases of the former kind the presumption is in favor of the plaintiff (Code Civ. Proc., sec. 1963, subd. 4; *Pennsylvania R. R. Co. v. Werner*, 89 Pa. St. 65), and to set aside a verdict in his favor on the ground of his contributory negligence, such negligence must affirmatively appear as a conclusion of law from the undisputed facts. (*Pennsylvania R. R. Co. v. Werner*, 89 Pa. St. 66.) Also, in applying these principles a distinction is to be noted between cases of injuries by street-railroads, and cases of injuries by "ordinary steam-railroads running through the country at comparatively long intervals of time." In either case, "ordinary prudence" is required on the part of persons crossing the track; but the question of what is ordinary prudence is widely different in the two cases. (*Driscoll v. Cable Ry. Co.*, 97 Cal. 565;¹ *Clark v. Bennett* 123 Cal. 278, 282; *Everett v. Los Angeles Ry. Co.*, 115 Cal. 117, 118.)

In the case at bar, it appears the deceased was killed while attempting to cross the track in front of the car. How far

¹ 33 Am. St. Rep. 203.

he was from the car when he started to cross cannot be regarded as determined. The motorman testifies that when he first saw him emerge into the light in front of the car, he was about ten feet in front of it and eight to the left of the track. But it was for the jury to determine the credibility of this testimony; and in view of the inconsistencies of the witness's statements with reference to distances and speed, and the evidence of witnesses as to statements made to them, which he denied,—or, in deed, without regard to these circumstances,—we cannot say that the jury were not justified in disregarding his testimony. All, therefore, that can be regarded as certain with regard to the distance of the deceased from the car, when he started to cross, is, that it was such that he was struck by it. But with reference to the question of negligence in crossing, some inference in his favor may be drawn from the testimony of the witness Hubbell, who saw him start to cross from the sidewalk, and who himself does not seem to have been apprehensive of any danger, and also from the testimony of witness Lainer, who testified that the eyesight of the deceased was bad, on account of the acid business in which he was engaged; that he could recognize one as far as across the room, but "could not see very far." There was also some evidence from which the jury may have inferred that the injury was the result of want of proper diligence on the part of the motorman after he first saw the deceased. From the testimony of Anderson, combined with that of the motorman, it appears that the car, on stopping, passed over a distance of about forty-six feet, or if deceased was more than ten feet in front of the car when first seen, correspondingly more; and also from the testimony of Anderson, that the car, when going at full speed, could be stopped within "fifteen or twenty or twenty-five feet." It seems, also, that the means used by the motorman to stop the car was that of putting on the brake, and that he "did not use the reverse"; though it appeared from the written instructions of the company that the latter was the course enjoined in cases of "any danger of striking a person or vehicle." The witness indeed testified that the former was the more effective means. But, in the absence of other testimony, the jury may have believed that the rule enjoined by the company was the wiser. In addition, it appeared that it was a dark night, that the street was badly lighted, especially at the place of the accident, and that it was free from vehicles; also, that the car was lighted within by several lamps

and carried a headlight. These, with the unusual speed of the car, and the failure to strike the bell or gong, are the material facts of the case, so far as they can be regarded as determined.

Upon these facts, we cannot say, "as a matter of law, that the negligence of the deceased was the proximate cause of the injury" (*Driscoll v. Cable Ry. Co.*, 97 Cal. 565¹); nor even that his attempt to cross the street in front of the car necessarily constituted negligence. (*Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656.)

On the latter point, it may be admitted, having regard to the position of the deceased when first seen by the motorman, as he emerged into the light, that it was imprudent in him to make the attempt to cross by accelerating his pace, or as expressed by the witness, by "making a fast dash" across in front of the car. But it is possible, not to say probable, that he was brought into this position by the negligence of the motorman in failing to ring the bell, and that his dash across the track was the result of perturbation of mind upon his suddenly becoming aware of the proximity of the car by the striking of the gong, which was then struck for the first time. In such case, the principle would apply, that "if the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault"; and of such case it is said, "Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person." (Shearman and Redfield on Negligence, sec. 89, and cases cited; *Voak v. N. Cont. Ry. Co.*, 75 N. Y. 323; *Pennsylvania Ry. Co. v. Werner*, 89 Pa. St. 59, 66.) "It may well have happened, [therefore,] that the jury thought" that if the bell or gong had been sounded at the proper distance, the deceased "would not have been hurt at all" (*Higgins v. Deeney*, 78 Cal. 580, 581); and if so, in view of his defective eyesight, and of the fact that on his starting across the street the circumstances were not such as to impress the only wit-

ness who saw him with the idea of danger, the conclusion cannot be regarded as going beyond the competency of the jury, or even as unreasonable.

So with regard to the effect of plaintiff's negligence, if any, it does not necessarily follow from the fact of such negligence that it contributed proximately to the injury. And the jury may have concluded from the evidence above cited that had proper diligence been used, and the proper means of stopping the car been adopted, the accident would have been avoided. (Shearman and Redfield on Negligence, sec. 99; *Everett v. Los Angeles Ry. Co.*, 115 Cal. 111, 114, 116.)

On the whole, we think the case comes within the principle of the decision in *Driscoll v. Cable Ry. Co.*, 97 Cal. 553.¹ There are some differences between the facts there, and those now presented, but none that are material. In that case, some stress was laid by the court on the fact of an intervening car, by which the view of the deceased may have been intercepted; but this is more than offset by the additional facts appearing in this case,—as, for example, the unusual speed of the car in approaching the crossing, the facts tending to show that it might have been stopped in shorter time, the defective eyesight of the deceased, and other facts we have adverted to. Our conclusion, therefore, may be expressed in the language of that decision: "Under these circumstances,—the appellant being in default for not having given the proper warning,—we think that the question whether deceased was guilty of contributory negligence was a proper one for the jury; that deceased cannot be held, as a matter of law, to have been so guilty. . . . And considering all the evidence and circumstances in the case, . . . and particularly the fact that the deceased had a right to rely upon the usual and required signal of bell-ringing when a car is approaching a crossing, we cannot say that the jury abused its power in holding the defendant not guilty of contributory negligence. The judgment of the learned judge of the court below, who heard all the evidence and refused a new trial, is also entitled to great consideration." (See, on the latter point, Code Civ. Proc., sec. 662.)

2. On the examination in chief, the witness Meley (the motorman) testified that he "could not tell" whether the car came in contact with the deceased; that he "did not see

¹ 33 Am. St. Rep. 203.

whether he came in contact with it or not"; and on cross-examination he was asked if he had not said to the witness Glassman,—referring to the deceased,—“I struck him lightly,” and if he had not made a similar statement to the witness Hubbell. Thereupon, objection being made, counsel for plaintiff made the following statement: “I am seeking to impeach this witness, and to show that he made statements at variance with his testimony now on the stand. I want to show that when he says he did not strike the deceased, *that he did strike him*. In other words, I propose to show here that he told Mr. Glassman and Mr. Hubbell, etc. . . . It is for the purpose of impeaching, and for that purpose only.” Whereupon the court said: “If that is the object of it, you may ask him the question. . . . The point is covered by section 2051.” The question was then asked, and the witness replied in the negative. Subsequently, the witnesses Glassman and Hubbell testified that Meley made to them the statements in question.

There was no error in admitting this testimony. The reference of the judge to “section 2051” was inadvertent; obviously the reference intended was to section 2052 of the Code of Civil Procedure. It was no part of the plaintiff’s offer to prove “that he [the motorman,—meaning the car] did strike him” (i. e., the deceased). Though these were the words used, the context shows a different meaning; nor, were it otherwise, would it make any difference. The testimony was admitted for the purpose of impeachment only. The statement of the witness Meley, subsequently made, that (he) “presumed [he] did strike Schneider, but [that he] was not sure of it,” did not materially vary his former statement; nor was the attention of the court called to it when the testimony of the contradicting witnesses was offered. Indeed, so long as the first testimony of the witness was not modified or withdrawn, the impeaching testimony was proper. Whether the statements made to Glassman and Hubbell were made by Meley, or by some other man, was a question for the jury. Both witnesses testified that they were made by him.

3. The court, on trial, instructed the jury, in effect, that “if the deceased were guilty of negligence in going upon the track, and yet the motorman in charge of the car, with proper appliances, and in the exercise of ordinary care, could have avoided the injury, the [negligence of the] deceased

. . . would not constitute any defense on the part of the defendant." This is objected to, on the ground that "there was no evidence on which it could properly have been based." But the contrary, as we have seen, was the case. The distance passed over by the car in stopping, the testimony of Anderson that it could have been stopped in a much shorter distance, and the failure of the motorman to reverse the car, as enjoined by the rules of the defendant, were all facts for consideration by the jury, and to which the instruction was appropriate.

Objection is also made to the instruction of the court with regard to the ordinance requiring the ringing of a bell or the sounding of a gong on approaching a "street crossing." But this objection—which is that there was no street crossing—has already been considered, and held to be untenable.

There were other exceptions to instructions and to the refusal of the court to give instructions. But as these are not touched upon in the brief of appellant, and as we do not perceive any error, we deem it unnecessary to discuss them.

We advise that the order appealed from be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 1679. In Bank.—November 11, 1901.]

J. W. SIEMSEN, Appellant, v. OAKLAND, SAN LEANDRO, AND HAYWARDS ELECTRIC RAILWAY, Respondent.

ORDER GRANTING NEW TRIAL—SPECIFICATION OF GROUND—REVIEW UPON APPEAL.—Under an order granting a new trial on the sole ground specified of the misconduct of a juror, the question of the sufficiency or insufficiency of the evidence, though specified in the motion, will not be reviewed upon appeal from the order, but the review will be confined to such misconduct, and to asserted errors of the court in the trial of the case.

ID.—MISCONDUCT OF JUROR—IMPEACHMENT OF VERDICT—AFFIDAVIT AS TO ADMISSIONS.—The alleged misconduct of a juror in visiting, during the trial, the scene of the accident in controversy, and using his examination to show the jurors how, in his judgment, the accident occurred, cannot be proved by an affidavit of his declarations or admissions to that effect, made after the close of the trial. His inability to impeach his own verdict on that ground extends to proof of his admissions, made to the same effect.

ID.—TIME OF MISCONDUCT OF JUROR.—There is no proper distinction between the misconduct of a juror during the trial, before retirement, and his misconduct after retirement, as respects the inadmissibility of his affidavit or admissions to impeach his verdict.

ID.—TRIFLING MISCONDUCT OF JUROR—ACTION FOR NEGLIGENCE—EXCESSIVE SPEED OF ELECTRIC CAR—IMMATERIAL VISIT TO TRACK.—Proof of trifling misconduct of a juror, which could not be prejudicial to the moving party, is not ground for disturbing a verdict; and in an action to recover for injuries, caused by the negligence of an electric railway company, where the sole ground of recovery is the excessive speed of an electric car, causing it to run off the track, to plaintiff's injury, and the defense was that the accident was caused by a latent, undiscoverable defect in the wheel, the visit of a juror to the track, and his inspection thereof, is not such misconduct as would justify a new trial.

NEGLIGENCE—RESPONSIBILITY FOR LATENT DEFECTS IN CAR WHEEL.—An electric railway company, charged with negligence for the excessive speed of its car, is responsible for latent defects in the wheel of the car, causing it to run off the track, to plaintiff's injury, which might have been discovered by proper tests during the process of its manufacture, notwithstanding the defects could not have been discovered after the vehicle came into its possession.

APPEAL from an order of the Superior Court of Alameda County granting a new trial. John Ellsworth, Judge. The facts are stated in the opinion of the court.

Fitzgerald & Abbott, for Appellant.

There being but one exception in this state to the rule that jurors cannot impeach their own verdict, every other exception is excluded. (*People v. Azoff*, 105 Cal. 634, 638; *Boyce v. California Stage Co.*, 25 Cal. 476; *People v. Ritchie*, 12 Utah, 180.) The instruction as to the responsibility of the defendant for latent defects in the car wheel was proper. (*Treadwell v. Whittier*, 80 Cal. 574;¹ *Hegeman v. Western Ry. Corp.*, 13 N. Y. 9.²)

Sam Bell McKee, A. A. Moore, and Chickering, Thomas & Gregory, for Respondent.

The rule that affidavits of jurors are not admissible to impeach their verdict extends only to matters taking place during their retirement, but does not affect affidavits of jurors for the purpose of showing any matter occurring during the trial, or in the jury-room, which does not essentially inhere in the verdict itself. (*Peppercorn v. Black River Falls*, 89 Wis. 38;³ *McBean v. State*, 83 Wis. 206; *Garside v. Ladd Watch Co.*, 17 R. I. 691; *Ortman v. Union Pacific Ry. Co.*, 32 Kan. 419; *Harrington v. Worcester etc. Ry. Co.*, 157 Mass. 579; *Aldrich v. Wetmore*, 52 Minn. 164; *Perry v. Bailey*, 12 Kan. 539; *Wright v. Tel. Co.*, 20 Iowa, 195, 210; Thompson on Trials, sec. 2619.) The instruction as to responsibility of the defendant for latent defects in the wheel, which could only have been discoverable in manufacture, was improper. (Civ. Code, sec. 2100; *Fisher v. Southern Pacific Co.*, 89 Cal. 399; *Lawrence v. Green*, 70 Cal. 417;⁴ *Perry v. Malarin*, 107 Cal. 363; *Treadwell v. Whittier*, 80 Cal. 574;⁵ *Jamison v. Santa Clara etc.*, 55 Cal. 593; Booth on Street Railways, sec. 332; 2 Shearman and Redfield on Negligence, sec. 497; 2 Rapalje and Mack's Digest of Railroad Law, 379, 341; Wharton on Negligence, 628, 629; Patterson on Railway Accident Law, 240; *Ingalls v. Bills*, 9 Met. 1;⁶ *Grand Rapids R. R. Co. v. Huntley*, 38 Mich. 537;⁷ *Nashville R. R. Co. v. Jones*, 9 Heisk. 27; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225;⁸ *Toledo etc. R. R. Co. v. Beggs*, 85 Ill. 80;⁹ *Carter v. Kansas City Cable Co.*, 42 Fed. Rep. 37; *Richmond etc. R. R. Co. v. Elliott*, 149 U. S. 266.)

¹ 13 Am. St. Rep. 175.

² 64 Am. Dec. 517.

³ 46 Am. St. Rep. 818.

⁴ 59 Am. Rep. 428.

⁵ 13 Am. St. Rep. 175.

⁶ 43 Am. Dec. 346.

⁷ 31 Am. Rep. 321.

⁸ 3 Am. Rep. 581.

⁹ 28 Am. Rep. 613.

HENSHAW, J.—Plaintiff sued to recover damages for injuries sustained by him, through the derailment of one of defendant's electric cars moving upon a street in the city of Oakland. The cause was tried before a jury, and the verdict and judgment were for plaintiff. In due time defendant moved for a new trial, upon the grounds of misconduct of the jury, insufficiency of the evidence, and errors of law occurring at the trial. The court granted the motion for a new trial upon the sole ground of the misconduct of juror Long, stating further, that all other grounds of the motion had been examined and found insufficient. Under this order we will not here review the evidence for a redetermination of the question of its sufficiency or insufficiency. (*Kauffman v. Maier*, 94 Cal. 269.) There are thus left for consideration the questions of the misconduct of the juror Long, and the asserted errors of the court in the trial of the case.

As to the issues joined by the pleadings, saving the issue upon the nature, character, and extent of plaintiff's injury, reference may be made to the case of *Johnsen v. Oakland etc. Electric Ry. Co.*, 127 Cal. 608. Plaintiff in that case was a passenger upon the same car to which the accident occurred. The evidence as to the nature, occasion, and extent of the accident to the car was substantially the same, and given by the same witnesses, in that case as in the case at bar. This evidence shows that the car was going at an unusual and excessive rate of speed, and that while upon a curve in the track, a flange of a wheel broke, the car was suddenly derailed, and the plaintiff hurled from the car to the ground, sustaining the injuries complained of. In the *Johnsen* case it was said: "It is first contended that the excessive speed of the car was not the proximate cause of the accident. This claim is based upon the testimony of defendant's witnesses to the effect that a perfect wheel of the kind here in use would safely support a similar car running at a speed much greater than the speed of this car at the time of the accident. This may be conceded, and still, under the facts of this case, it might well be said by the jury that the excessive and unlawful rate of speed of the car was the proximate cause of the injury. The jury may well have been justified in saying that after the flange of the wheel broke, the car would not have left the track, if the speed had not been excessive; or the jury may have gone a step further, and declared that even though the car would have left the

track, still the plaintiff would not have been injured, if the car had been traveling at an ordinary and lawful rate of speed." To this it may be added, that the jury might also have concluded that even the defective flange would not have broken except for the inordinate strain put upon it by the excessive and unlawful speed.

So much by way of preliminary to an understanding of the matters relating to the alleged misconduct of the juror Long. In support of this ground of motion, defendant offered two affidavits,—the one by Frank Putnam, a conductor upon one of the cars of defendant company; the other by C. Gustafson, superintendent of the defendant company. The latter affidavit the court refused to admit in evidence. Gustafson declares that after the verdict in the case, and after the discharge of the jury, he had a conversation with the juror Long, in which Long told him that during the trial of the cause he had visited the place of the accident, and made an examination of the track and rails, from which examination he became reasonably certain of the way in which the accident had happened; that by reason of this visit he was the only one of the jurors familiar with the scene of the accident, and thereby became able to show, and did show, his fellow-jurors, in their deliberations, how, in his judgment, the accident occurred. This affidavit was properly refused admission in evidence. While it is not, in terms, an affidavit by a juror impeaching his own verdict, it is an affidavit of admissions made by a juror to the same effect. If the juror himself would not have been permitted to make affidavit directly to these facts, clearly the affidavit by another, of his declarations and admissions, offered for the same purpose, would be equally inadmissible. What the juror could not do directly could not thus indirectly be effectuated. However the rule may be in other states, it is settled in this beyond controversy that a juror may impeach his own verdict upon no other ground than that designated by the code. (Code Civ. Proc., sec. 657, subd. 2. See *Boyce v. California Stage Co.*, 25 Cal. 463; *Polhemus v. Heiman*, 50 Cal. 438; *People v. Gray*, 61 Cal. 183;¹ *People v. Deegan*, 88 Cal. 602; *People v. Azoff*, 105 Cal. 632; *Saltzman v. Sunset Telephone Co.*, 125 Cal. 501.)

It is sought by respondent, upon this motion, to make a

¹ 44 Am. Rep. 549.

distinction between the misconduct of a juror before retiring, and the misconduct of a juror during retirement; but to this it may be said, in the language of *Boyce v. California Stage Co.*, 25 Cal. 463: "In conclusion, upon this branch of the case we may add that a line of judicial decisions which struggles to multiply exceptions to a plain and simple rule, founded on considerations of the wisest policy, is not to be favored; on the contrary, the struggle should be to bring every case within the rule, lest the rule itself become shadowy, and in time wholly disappear in a multitude of exceptions." Utah adopted into its code the exact provision found in subdivision 2 of section 657 of our Code of Civil Procedure. In *People v. Ritchie*, 12 Utah, 180, that court elaborately considers the question, and coincides with the views here expressed. Of course, affidavits of jurors in support of their verdict are upon all occasions admissible.

There is left, then, for consideration the affidavit of Putnam alone. Putnam swears that during the trial of the cause, while passing with his car at the scene of the accident, he saw Long "standing between the tracks, watching the car and observing its progress"; also, that "he seemed to be examining the ground and the south track. . . . He made examination of the rails of the company in the locality of the Lake View Cottage, and seemed to be trying to understand their construction and position." This affidavit is not controverted. The foregoing is all of the evidence upon misconduct. While the exercise of a liberal discretion in the granting of new trials is recognized, it does not follow that an order must always be upheld, or will be upheld, where an examination of the record discloses that the misconduct was of such trifling nature that it could not, in the nature of things, have been prejudicial to the moving party. Where it appears that the fairness of the trial has been in no way affected by such impropriety, the verdict will not be disturbed. (*State v. Allen*, 89 Iowa, 49.) Where the *locus* itself is in dispute, or where its exact condition has an essential bearing upon the controversy, it may well be that a verdict should be set aside upon proof that a juror improperly acquired knowledge of that *locus*, or its condition, by visiting the place, but, as was said in *Bowman v. Western Furniture Mfg. Co.*, 96 Iowa, 188, where there is no controversy as to the locality inspected, and no probability of prejudice resulting from the inspection, the verdict should not be disturbed. Here, the place of the accident was not disputed.

The cause of the accident, as alleged in the complaint, and upon proof of which alone plaintiff was entitled to recover, was, that the car was so "negligently and carelessly maintained, operated, and managed that, while moving at great and unlawful speed, it ran off the track of said railroad." That it did run off the track is not disputed, the defense against this charge of negligence being that the accident occurred by reason of a latent defect in a wheel, which could not, by the exercise of due care, have been discovered, and which was not discovered. It is not charged in the complaint that the car left the track by reason of defective rails or road-bed, and we fail to see, therefore, how the affidavit of Putnam, which amounted to nothing more than that he saw the juror between the tracks, *seemingly* examining them, is a sufficient showing to justify a new trial.

In the instructions complained of, the court charged the jury as to the responsibility of defendant company for latent defects in the wheel. It is said by Shearman and Redfield, in their work on Negligence (sec. 497): "Whether he [defendant] is responsible for defects which could not have been thus discovered after the vehicle came into his possession, but could have been discovered by the use of such tests during the process of manufacture, is a question upon which there is a difference of opinion. In New York it has been distinctly held that he is. It was so held in England many years ago, but in later cases the question has been purposely left open. In Massachusetts and Scotland, it is held that he is not." Of the New York cases bearing upon this question may be cited: *Hegeman v. Western R. R. Co.*, 13 N. Y. 9;¹ *Alden v. New York etc. Ry. Co.*, 26 N. Y. 102;² *Birmingham v. City of Brighton Ry. Co.*, 59 Hun. 538. In this state, the rule as laid down in New York has been adopted. (*Treadwell v. Whittier*, 80 Cal. 574.³)

We perceive no error in the rulings of the court complained of in admitting or rejecting evidence.

For the foregoing reasons the order appealed from granting defendant a new trial is reversed.

Temple, J., Harrison, J., Garoutte, J., and Van Dyke, J., concurred.

Rehearing denied.

¹ 64 Am. Dec. 517.

³ 13 Am. St. Rep. 175.

² 82 Am. Dec. 401.

[Crim. No. 842. In Bank.—November 15, 1901.]

Ex parte WILLIAM MAUCH, on Habeas Corpus.

CRIMINAL LAW—CRUELTY TO ANIMAL—COMPLAINT IN POLICE COURT—MALICE—LANGUAGE OF STATUTE—EQUIVALENT IMPORT.—A complaint in a police court charging the defendant with cruelty to an animal, committed "by willfully and unlawfully cruelly beating and torturing a certain dog," named, need not specifically charge that the act was malicious. Though malice is a necessary ingredient in the offense, it is necessarily involved in the charge of willful and unlawful cruelty, which is malice. It is sufficient to use language of equivalent import, without using the very language of the statute.

ID.—POLICE COURT OF MARYSVILLE—POWER OF LEGISLATURE—JURISDICTION OF OFFENSE CHARGED.—The legislature had power by the act of 1876 to provide in the reincorporation of the city of Marysville for a police court for said city; and its intent so to do is sufficiently manifested by the provisions of that act for the election of a police judge, and giving to him all the power granted to him by the Political Code, except the power to appoint clerks, and making the assessor *ex officio* clerk of the police court. A police judge implies a police court, and the jurisdiction of that court is defined by the provisions of the Political Code, which include the offense of which the defendant was convicted.

HABEAS CORPUS in the Supreme Court to the Sheriff of Yuba County to determine the validity of a conviction of the petitioner in the Police Court of the City of Marysville. R. R. Raish, Police Judge.

The facts are stated in the opinion of the court.

Johnson & Redington, for Petitioner.

E. P. McDaniel, for Respondent.

BEATTY, C. J.—William Mauch was convicted in the police court of the city of Marysville upon a charge of cruelty to an animal, committed, as the complaint charged, by willfully and unlawfully cruelly beating and torturing a certain dog named "Sport," etc.

It is claimed that his imprisonment upon said conviction is unlawful because the complaint fails to charge that the act was malicious, and that malice is an essential ingredient of the crime. It is true that the beating and torturing must

be malicious, in order to constitute the offense (Pen. Code, sec. 597), but willful and unlawful cruelty is malice. It is not necessary to lay the charge in the very language of the statute. It is enough to use language of equivalent import.

It is further contended that the judgment of conviction is void because there is no such court as the police court in the city of Marysville.

Marysville was reincorporated by an act approved March 7, 1876. (Stats. 1875-76, p. 149.) By this act it was provided, (sec. 6) that the mayor and common council should elect all subordinate officers of the city, including police judge; (sec. 11) that the assessor should be *ex officio* clerk of the police court; and (sec. 13) that the police judge should exercise all the powers granted him by the Political Code, except the provisions of section 4425 (which empowers police judges to appoint clerks). But the act does not, in express terms, create a police court. In 1889 an act was passed to establish a police court in the city of Marysville. (Stats. 1889, p. 214.) The petitioner contends that the court depends for its existence on this act alone, and that the act is unconstitutional and void.

We do not deem it necessary to consider the objections to the validity of the act of 1889. Conceding it to be invalid, the police court was lawfully established by the act of 1876. There is no question that the legislature had the power to create a police court by the act to reincorporate the city, and the only question is, whether the intention to do so is clearly manifested by the terms of the act.

We think it is. A police judge implies a police court (*Quigg v. Evans*, 121 Cal. 546), and the act itself assumes the existence of the court, in the provision making the assessor, *ex officio*, its clerk. The jurisdiction of the court is defined by the Political Code (secs. 4424-4432), and includes the offense of which the prisoner was convicted.

The prisoner is remanded.

McFarland, J., Harrison, J., and Temple, J., concurred.

[S. F. No. 1944. Department One.—November 18, 1901.]

JOHN MACDONALD, Appellant, v. WILLIAM P. COOL
et al., Respondents.

MORTGAGE—DEED OF THIRD PARTY PROCURED BY FRAUD OF DEBTOR—SECURITY FOR PRE-EXISTING DEBT—INNOCENT CREDITOR NOT PROTECTED.—An innocent creditor, who, without knowledge of the fraud of his debtor, accepts as security for a pre-existing debt a deed fraudulently procured by his debtor to be made from a third party to the creditor, under an agreement by the debtor that he was to secure a loan thereon from the creditor for the use of such third party, and was to return the deed or reconveyance if the loan was not obtained and delivered to the third party within a time specified, has suffered no loss by reason of the deed, and cannot enforce it as a mortgage for the pre-existing debt of his debtor against the third party.

ID.—AGENCY DEFINED IN RECEIPT—OSTENSIBLE AGENCY.—The agency of the debtor for such third party having been specifically defined in the receipt for the deed, the creditor cannot rely upon any ostensible agency by reason of the delivery of the deed to his debtor, but if dealing with the debtor as an agent of such third party, was put upon inquiry as to the terms of the agency.

ID.—INAPPLICABLE MAXIM—LOSS OF ONE OF TWO INNOCENT PARTIES.—The maxim that where one of two innocent parties must suffer loss, it is to be borne by the one whose fault or neglect occasioned the loss, cannot apply where no loss was occasioned to the other party by such fault or neglect.

ID.—MISTAKE BETWEEN INNOCENT PARTIES—CONSIDERATION.—The deed fraudulently procured by the debtor from the third party to the creditor was, as between the innocent parties, an entire mistake which vitiates it as a mortgage as between them for the pre-existing debt of the debtor to the creditor; and the question is not whether there was such consideration as would support a contract.

APPEAL from a judgment of the Superior Court of Santa Cruz County. A. S. Kittredge, Judge.

The facts are stated in the opinion of the court.

Reel B. Terry, for Appellant.

H. W. Hutton, for Respondents.

TEMPLE, J.—This is an action to have a deed, absolute on its face, declared to be a mortgage, and to foreclose the same. It appears from the findings, which are supported by

the evidence, that plaintiff, in 1897, was a money-lender in San Francisco, and that the defendant J. F. Turner was indebted to him in the sum of seven hundred dollars, for which plaintiff held two promissory notes executed by said Turner, and certain collaterals as security. Plaintiff was dissatisfied with his security, and Turner desired more money. Turner then, as plaintiff testified, suggested that he owned a tract of land which was standing in the name of Mrs. Cool, and said he would cause a deed to be made to Mr. Macdonald by Mr. and Mrs. Cool, and thereupon would seek further credit. As a matter of fact, Mr. Turner was not the owner of any interest in the land, but he knew that Mrs. Cool desired to secure a loan of six hundred dollars upon it, and therefore represented to her that Mr. Macdonald would loan the money to her upon the land, and advised her to deed the land to Macdonald, who would hold it as security. Mr. and Mrs. Cool made the deed as suggested, and handed it to Turner, who gave for it the following receipt:—

“SAN FRANCISCO, March 4th, 1897.

“Received from Dr. W. P. Cool, deed of lots 5, 11, 12, 13, and 14 of township 10 south, range 2 east, section 9, Mount Diablo meridian, containing 171 55 / 100 acres. Said deed to be placed in my hands for the purpose of obtaining at least \$600.00, which said sum is to be obtained on or before Monday, March 8th, and delivered to said W. P. Cool, or said deed is to be returned to said W. P. Cool, unrecorded or reconveyed, clear and free of all encumbrances, without any expense to said W. P. Cool.

“(Signed)

J. F. TURNER.”

Turner took the deed to Macdonald, but did not disclose to him the purpose for which Mrs. Cool had intrusted it to him. Macdonald, supposing the property belonged to Turner, and that the deed was intended to secure Turner's indebtedness to him, and for further advances, called upon Dr. Cool and asked him in regard to the value of the property. Dr. Cool, supposing the inquiries had reference to the expected loan to Mrs. Cool, assured Macdonald that the property was worth three thousand dollars. Mr. Macdonald then advanced to Turner \$120 above his previous indebtedness, and agreed to extend the time of payment of the prior indebtedness for sixty days. This was in consideration of the new security furnished by the deed. The additional loan of \$120 had been repaid before the commencement of

this action. The questions have reference, therefore, only to the indebtedness which had accrued before the deed was executed.

It is contended by the appellant that Mrs. Cool made Turner her agent, and is bound by his acts within the scope of his agency, although his conduct was contrary to some undisclosed intention on the part of the principal. It is also contended that there was an undefined ostensible agency created by merely intrusting the deed to Turner.

The agency, if such there was, is defined in the receipt, and if Macdonald was dealing with Turner as the agent of Mrs. Cool, he should have ascertained the extent of the agency. I see no ground whatever for holding that there was an ostensible agency for any specific purpose. The delivery of the deed to Macdonald was well calculated to impress Macdonald with the truth of Turner's representation that the property belonged to him (Turner), and I have no doubt that is the precise effect it did have. Macdonald did not treat with Turner as the agent of Mrs. Cool, although he did in fact have authority from her to deliver the deed to Macdonald for a specified purpose.

The only basis upon which Macdonald would have any plausible ground for a recovery is, as it seems to me, upon the principle that where one of two innocent parties must suffer loss, it should be put upon him by whose fault or negligence the loss has been occasioned.

That it was negligence for Mrs. Cool to intrust the deed to Turner may be admitted, or whether there was negligence or not, her act in so trusting Turner occasioned the loss, if in consequence of the transaction loss accrued to Macdonald. But it does not appear that the delivery of the deed has occasioned any loss. The deed was received to secure a pre-existing debt. Macdonald did not, in consequence, surrender any collateral held by him, and it does not appear that he could have collected anything from Turner; or if he could have done so, that he forbore or was prevented by accepting the deed. As between himself and Mrs. Cool, the whole thing was a mistake, and the question is not whether there was such consideration as would support a contract.

Mrs. Cool testified that she did frequently apply to Turner to know why he did not give her the money which she supposed he had got or would get from Macdonald, and that

he accounted for delay in getting the money in one way or another. She did not know or suspect that a fraudulent use had been made of the deed until Macdonald made demand for the money due him from Turner.

The judgment and order are affirmed.

McFarland, J., and Henshaw, J., concurred.

[Crim. No. 750. Department Two.—November 18, 1901.]

THE PEOPLE, Respondent, v. M. W. WESTLAKE, Appellant.

CRIMINAL LAW—MURDER—EVIDENCE—SHIRTS AND CUFFS OF DECEASED—LAUNDRY-MARK—IDENTIFICATION.—Upon the trial of a defendant accused of murder, shirts and cuffs, found in a valise of the deceased in the possession of the defendant, were sufficiently identified to be received in evidence, where it appeared that other articles of the deceased were found in the valise, that one of the cuffs bore his initials, and that the laundry-marks upon the shirts corresponded with the laundry-mark upon a package containing the cuffs and shirts, which was entered in the books of the laundry.

ID.—QUESTION FOR JURY—INSTRUCTIONS—PRESUMPTION.—The questions whether the evidence was sufficient to prove the fact that the deceased owned the shirts, or whether the circumstance was an indication of guilt, were for the jury to determine, under proper instructions of the court. The instructions will be presumed proper, where no objections were made to them.

ID.—DISCRETION OF COURT—OBJECTS COGNIZABLE BY THE SENSES—DISCRETION NOT ABUSED—CONNECTION OF ACCUSED WITH OBJECTS.—Under section 1954 of the Code of Civil Procedure, the admission of objects cognizable by the senses, and of the proof thereof, in a proper case, must be regulated by the sound discretion of the court. Its discretion was not abused by the admission, after proper preliminary proof, of the shirts and cuffs of the deceased which were found in his valise, with other articles belonging to him, in the possession of the defendant, being thus directly traceable to the accused.

ID.—REFRESHMENT OF MEMORY OF WITNESS—LAUNDRY-MARK—ENTRIES IN LAUNDRY BOOK—COUNTING OF PIECES BY ANOTHER.—A witness who personally made the entries in the laundry book at the time when the laundry of the deceased was received at the laundry, may refresh his memory thereby; and the fact that some one else

counted the pieces in the presence of the witness is immaterial, where the only question is as to the identify of the laundry-mark entered upon the book with that upon the shirts found in the valise of the deceased, and the laundry-mark was not received by hearsay.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. R. C. Rust, Judge presiding.

The facts are stated in the opinion.

Clarken & Moynahan, and John C. March, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

'COOPER, C.—Defendant was convicted of murder, and appeals from the judgment and order denying his motion for a new trial.

It is claimed that the court erred in admitting in evidence two shirts and two pairs of cuffs under defendant's objection, for the reason that they were not sufficiently identified as the property of deceased. When defendant was arrested at Reno, the officer found in his room at the Clarendon Hotel, among other articles, a valise containing the shirts and cuffs, a suit of underclothes, some photographs and collars. One of the cuffs was marked with the initials "R. R. W.," being the initials of deceased, whose name was R. R. Watts. The valise and some other articles found in the room were admitted in evidence without objection.

The witness Watts stated that deceased had, during the month of January, 1899, delivered some washing to the Union Laundry, and that the said washing was returned in February.

The witness Odell testified that he was the wagon-driver for the Union Laundry, and that he remembered receiving laundry from deceased, which was returned about a month after it was received; that the laundry was marked; that it was the only time deceased had any washing in the Union Laundry, to the knowledge of witness. The witness was then shown the shirts, and said the mark was the same as the laundry he delivered to deceased; that the mark had never been in the Union Laundry before, and that the mark corresponds with the laundry books,—with the mark on the laundry books; that he knew the laundry delivered to de-

ceased bore upon it the mark upon the shirts, and it is the mark upon the laundry books.

The witness Gilbert Manning testified that he was the book-keeper and proprietor of the laundry; that they received a package with the same laundry-mark upon it as that on the shirts, about January 8th. The witness identified the mark upon the shirts as the mark used upon the package of laundry left by deceased, the mark being a capital D and figure 7; that this was the only time such mark was in the Union Laundry.

The witness Frank J. Manning testified that he kept the books of the Union Laundry at the time deceased left the package there; that the package was left January 8th, and consisted of three shirts, five collars, and four pairs of cuffs; that the laundry-mark was "D7," and is the same as on the shirts and cuffs shown witness.

This testimony was sufficient to authorize the admission of the shirts and cuffs in evidence. They were found in a valise in the possession of defendant, with other articles of deceased. One of the cuffs had on it the initials of deceased. The fact that the deceased had taken a package containing shirts and cuffs to the Union Laundry only once; that the shirts were marked, and an entry made in the books; that the entry corresponded with the laundry-mark on the shirts—was sufficient to authorize the shirts to be admitted in evidence. Whether the evidence was sufficient to prove the fact that deceased owned the shirts, or whether the circumstance was an indication of guilt, were questions for the jury to pass upon, under proper instruction from the court. We must presume that the court properly instructed the jury, as no objection is made to the instructions.

It is provided in section 1954 of the Code of Civil Procedure: "Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, or character may be proved by witnesses. The admission of such evidence must be regulated by the sound-discretion of the court."

Under the above section the shirts and cuffs were properly allowed in evidence, after the preliminary proof herein recited. The court did not abuse its discretion in admitting

them. The objection was rather to the weight of the evidence, than to its admissibility, and even if somewhat remote, the court did not err in admitting it. It was a circumstance, and the fact that the shirts and cuffs were found in the valise, in the possession of defendant, with other articles, the property of deceased, is an incident traceable directly to the accused. (*People v. Martin*, 102 Cal. 568.)

The witness Frank Manning was properly permitted to refresh his memory by the entries made in the laundry book by himself. They were made at the time the laundry was received by the witness, in his own handwriting, and the fact that some one else counted the shirts or pieces and gave witness the number can make no difference. The counting was done in the presence and hearing of the witness. But aside from this, there is no controversy about the number of pieces, but as to the identity of the laundry-mark with that on the shirts. The witness did not receive the laundry-mark by hearsay.

The judgment and order should be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 786. Department Two.—November 18, 1901.]

JACKSON SCHOOL DISTRICT OF AMADOR COUNTY,
Appellant, v. C. L. CULBERT, Auditor, etc., Respondent.

MANDAMUS—DEFAULT OF DEFENDANT—DENIAL OF WRIT—APPEAL—
ERROR NOT APPEARING.—In a *mandamus* proceeding, the allegations of the petition are not taken as true because of the default of the defendant, but the court must hear the cause notwithstanding, and where, upon such hearing, the writ was denied, the judgment of the court must be affirmed upon appeal of the defendant, if it is not shown by the record that the court erred in refusing the writ, and that such a case was made before it as required its issuance.

APPEAL from a judgment of the Superior Court of Amador County. R. C. Rust, Judge.

The facts are stated in the opinion of the court.

E. A. Freeman, and W. H. Willis, for Appellant.

C. P. Vicini, and William J. McGee, for Respondent.

TEMPLE, J.—This appeal is from a judgment of the superior court of Amador County refusing to issue its mandate to the auditor of that county, requiring and commanding him to levy a school tax of forty-three cents upon each one hundred dollars of the equalized assessment roll of the county. It is alleged in the verified petition that the county superintendent and the county auditor, on or before the fifth day of September, 1899, made, respectively, as required by law, an estimate of the minimum amount required for the county school fund for the ensuing year, which amount was \$16,854, being six dollars for each census school child in the county. The equalized assessment roll for the year showed \$4,673,220. After deducting from this amount fifteen per cent for delinquencies, and dividing the said \$16,854 by the sum so obtained, it would give forty-three cents upon each one hundred dollars as the minimum school tax for the county. The supervisors, when they met to levy the county tax, made the levy for thirty-two cents on the one hundred dollars, and refused to levy the minimum rate allowed, of forty-three cents. Upon this failure of the board of supervisors, due demand was made upon respondent, as auditor, that he should levy the tax, and add the said minimum rate to the assessment roll, but he declined to do so, and this proceeding was brought.

No answer was filed by the respondent. The judgment, after a recital of preliminary matters, among which is the statement that C. P. Vicini and William J. McGee appeared as counsel for respondent, is: "It is hereby ordered, adjudged, and decreed that said petition be, and the same is, hereby denied."

It is said that the court filed an opinion, but it is not before us, and we can only surmise upon what ground the writ was denied. The opinion, however, if we were at liberty to take it into consideration, would not supply the defect. Section 1088 of the Code of Civil Procedure pro-

vides: "The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not." If the trial court cannot grant the relief upon the pleadings, it would seem to follow that this court cannot reverse a judgment denying the writ unless it is made to appear that such a showing was made before the lower court as would require the issuance of the writ. As the allegations of the petition are not taken as true because of the default, it may be that it was there shown that the board of supervisors had fully performed their duty. At all events, appellant must show by the record that the court erred in refusing the writ, or the judgment must be affirmed and it is so ordered.

McFarland, J., and Henshaw, J., concurred.

[Sac. No. 790. Department Two.—November 18, 1901.]

JOHN McCORMICK, Respondent, v. NATIONAL SURETY COMPANY, Appellant.

FINDING—CONSTRUCTION—GENERAL AND SPECIAL FINDING.—A general finding that certain averments of the complaint are true will be controlled by a special finding inconsistent with such general finding.

BOND TO RELEASE ATTACHED PROPERTY—JUDGMENT IN FAVOR OF OWNER AND AGAINST CO-DEFENDANT—LIABILITY OF SURETY.—Under our statute, the condition of a bond given to release attached property requires the redelivery thereof to the sheriff, if the plaintiff recovers any judgment in the action, notwithstanding it appears that judgment was rendered in favor of the owner of the attached property, and against a co-defendant who had no interest therein; and in default of such redelivery, a surety on the bond is liable to pay the full value of the property to the plaintiff, not exceeding the amount of such judgment.

Id.—OWNERSHIP OF ATTACHED PROPERTY IMMATERIAL TO SURETY.—The actual ownership of the property attached is no concern of a surety on the bond to release the attachment. Whether it belongs to a third party, or for any legal reason is subject to attachment, is a question to be litigated between the plaintiff and the adverse claimant, and does not affect the express covenant of the surety to restore the property.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

Chickering, Thomas & Gregory, and J. J. Burt, for Appellant.

Louttit & Middlecoff, for Respondent.

McFARLAND, J.—Action against surety on a statutory undertaking given for the purpose of having an attachment discharged pursuant to sections 554 and 555 of the Code of Civil Procedure. Judgment went for plaintiff in the court below, and from the judgment and an order denying a new trial defendant appeals.

The plaintiff herein brought a former action against the Stockton and Tuolumne County Railroad Company, a corporation, and its president, Annie Kline Rikert, to recover from them \$5,710, with interest, etc., on a written contract for the direct payment of money, etc., alleged to have been made by both the defendants therein; and in said action he procured a writ of attachment, which was levied on certain steel rails and fittings as the property of said defendants. Afterwards, the defendants therein procured an order releasing said attached property upon the execution of an undertaking in the sum of seven thousand dollars. Such undertaking was executed by the National Surety Company, defendant in the present action, and said property was thereupon released. The said former action was thereafter brought to trial, and a judgment was rendered against one of the defendants therein—Mrs. Rikert—for \$6,282.49, together with interest, costs, etc., but plaintiff therein failed to obtain any judgment against the other defendant, the Stockton and Tuolumne County Railroad Company, and the latter had judgment for costs. Thereafter, the defendant in this present action and the defendants in the former action refused to return any part of said attached property, or to pay said judgment, or any part thereof. The attached property was of the value of seven thousand dollars, and the judgment herein is for less than that amount.

A general finding of the court that certain averments of the complaint were true included the fact that the attached

property belonged to both the defendants in the former action; but there was a special finding that it belonged to the defendant the said railroad company alone, subject to certain liens, and that the defendant Rikert had no interest therein. Appellant's contention that the special finding must prevail is correct, and this appeal must be determined upon that theory.

Appellant makes some minor contentions, which we do not think maintainable, and which need not be specially noticed. Defendant's main contention is, substantially, that the judgment is erroneous because in the former action no judgment was obtained against the defendant therein to whom the attached property belonged; but this contention cannot be maintained.

The undertaking on which this action is based recites the pendency of said former action, and the issuance of the attachment, its levy on said property, the application of the defendants therein to have the attached property released under section 554 of the Code of Civil Procedure, the fixing of the amount of the undertaking by the court, and all other preliminary steps; and it provides that the National Surety Company, "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned, and the discharge of said attachment, does hereby undertake in the sum of seven thousand dollars, and promises that in case said plaintiff *recover judgment in said action*, the defendants will, on demand, redeliver said attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the said defendants and surety will, on demand, pay to the said plaintiff the full value of the property released, not exceeding the sum of seven thousand dollars." The form and substance of the undertaking are in strict conformity with the provisions of the code. It is a statutory undertaking, and its direct and express covenants are, that the things promised shall be done if the plaintiff in the action shall "*recover judgment in said action*." There is no condition in it that plaintiff shall recover judgment against all of those who are made defendants; a judgment against any one or more of the defendants is sufficient. (*Heynemann v. Elder*, 17 Cal. 433; *McCutcheon v. Weston*, 65 Cal. 37.) In the latter case the court say: "The point that judgment was recovered against one of the defendants, only, in the attachment suit is not well taken. The action, was against two, and the under-

taking was to pay 'if the plaintiff shall recover judgment in said action.' Why judgment was recovered against one only we are not informed, but the court had power to render such judgment, and it was rendered in that action." In *Poole v. Dyer*, 123 Mass. 363, the court said: "The result, so far as the sureties are concerned, is the same, whether the plaintiff discontinues against one of the defendants, or fails to recover against him upon trial."

The actual ownership of the property attached is no concern of the surety. He can meddle with such property and remove it beyond the reach of the attaching creditor only by undertaking that if the plaintiff recover judgment in the action, it—the identical property attached and released—shall be restored to the attaching officer. Whether it belongs to a third party, or for any reason is not legally subject to the attachment, is a question to be litigated between plaintiff and the adverse claimant, and in no way affects the surety's express covenant to restore. In a similar case (*McMillan v. Dana*, 18 Cal. 339) the court says: "Nor does it matter whether the property was subject to the attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that the sureties procured its release upon the stipulation that in consideration of such release they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit." In *Drake on Attachments* (sec. 339) the above rule is fully stated, with abundant citations of authorities to the point; and it is there said,—speaking of sureties on an undertaking for the release of property attached,—“they undertook to have it forthcoming, and it is their duty to comply with their obligation and leave it to the plaintiff in the attachment and the claimant of the property to litigate their rights; not to take it out of the possession of the plaintiff and put it into that of an adverse claimant, and thus excuse themselves for a breach of their covenant.”

Complaint is made of the hardship of taking the property of the railroad company to satisfy a judgment against its president, Mrs. Rikert. Whether, considering the relations between the railroad company and its president, and their connection with the railroad and the ownership of the attached property, this alleged hardship is meritorious or merely founded on technical advantages need not be in-

quired into. The appellant, the surety company, has no concern with that matter; its duty was to restore the property. What should be done with it after its restoration was a question between the plaintiff and the railroad company, and in no way affects the covenants of the undertaking executed by appellant.

In answer to some of the authorities from Massachusetts cited by respondent, appellant calls attention to the fact that there one of several defendants may, by statutory provision, have his individual property released from attachment upon an obligation to restore it to satisfy any judgment against *him*; but we do not see how that fact at all helps appellant in the case at bar. That provision may be a just one; but we have no such statute, and the rights of the parties to this action must, of course, be determined by the statutory provisions of this state touching the matter here involved.

The judgment and order appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 1965. Department Two.—November 18, 1901.]

SAMUEL W. BORING, Receiver, etc., of James G. Dunham, Respondent, v. A. C. PENNIMAN and H. S. PENNIMAN, Appellants.

FORECLOSURE OF MORTGAGE BY RECEIVER—NOTES LEVIED UPON UNDER EXECUTION—EVIDENCE—VOID PERSONAL JUDGMENT—PUBLICATION OF SUMMONS AGAINST NON-RESIDENT.—In an action by a receiver to foreclose a mortgage securing notes which were levied upon under execution, evidence of the judgment roll under which the execution was issued is inadmissible to support the foreclosure, where it appears upon the face thereof that it was a void personal judgment rendered against the owner of the notes, who was a non-resident of the state, and did not appear in the action against him, and that the service of summons upon him was made by publication only, so that the court acquired no jurisdiction of his person.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. A. S. Kittredge, Judge.

The facts are stated in the opinion of the court.

J. R. Welch, for Appellants.

E. E. Cothran, and John Reynolds, for Respondent.

THE COURT.—James C. Dunham killed a number of people, and thereafter the parents of one of his victims brought suit against him for damages resulting to them from his having taken the life of their daughter. In said suit service was made by publication; the defendant did not appear, and plaintiffs obtained a judgment for eight thousand dollars and costs. Thereafter, execution was issued on said judgment and levied upon two notes belonging to said Dunham. These two notes were executed by the defendants herein, and were secured by a mortgage executed by and between the same parties. This action was brought by a receiver, appointed for that purpose by the court, on said notes, and to foreclose said mortgage. The defendants resisted the suit, and on the trial the plaintiff was permitted, against the objection that no valid service of summons was shown, to put in evidence the judgment roll in the action brought against Dunham. The plaintiff obtained judgment for a foreclosure, and the defendants appeal from said judgment and from an order denying a new trial.

The order for publication of summons in the Dunham case recites as follows: "Upon reading and filing of the affidavit of Jacob A. Shesler in the above-entitled action, and it satisfactorily appearing therefrom that the defendant, James C. Dunham, has departed from the state, and is residing out of the state, and cannot, after due diligence, be found within this state, . . . and it further appearing that a summons has been duly issued out of said court in this action, and that personal service of the same cannot be made upon the said defendant, James C. Dunham, for the reason hereinbefore contained, and by the said affidavit made to appear, upon motion of E. E. Cothran, Esq., attorney for plaintiff herein, it is hereby ordered that the service of the summons in this action be made upon the defendant, James C. Dunham, by publication thereof," etc.

The affidavit upon which this order was based contained

the following: "That said defendant cannot, after the exercise of great and extraordinary search and diligence by the sheriff of said county, and many peace-officers and persons of said county and state, be found within said state of California; . . . and affiant, in the further support thereof, states the following facts and circumstances, to wit: That on the night of the 26th day of May, 1896, in said county and state, the defendant willfully, feloniously, and with malice aforethought, did kill and murder the said Minnie Shesler and other persons, and defendant immediately fled from the scene of his said crime, and though a large reward has been offered for his apprehension and arrest, it has thus far been impossible to effect his capture, and the whereabouts and residence of said defendant are to this affiant unknown, notwithstanding affiant has made diligent inquiry to find said defendant, and affiant cannot, after due diligence, find defendant within this state."

While it is not positively stated in the affidavit that the defendant has his residence outside of this state, yet the facts stated make it highly probable that Dunham left the state, intending never to return, and therefore the court was warranted in finding in the order of publication that Dunham had "departed from the state and is residing out of the state."

Upon the authority of *De La Montanya v. De La Montanya*, 112 Cal. 101,¹ and the cases therein cited, we think it must be held that it appeared from the judgment roll that the court obtained no jurisdiction of the person of Dunham, and that the judgment against him was void. For that reason the objection to the judgment roll should have been sustained. The arguments for and against this proposition will be found in the case cited. It will be unnecessary to repeat them here.

The judgment and order appealed from are reversed.

McFARLAND, J., concurring.—I concur in the judgment of reversal, on the ground that at the time of the institution of the action against Dunham, and the rendition of the judgment therein, he was a non-resident of this state, having neither his actual residence nor his legal domicile here.

¹ 53 Am. St. Rep. 165.

[L. A. Nos. 515, 516, 517. In Bank.—November 19, 1901.]

COUNTY OF RIVERSIDE, Respondent and Appellant, v.
COUNTY OF SAN BERNARDINO, G. T. STAMM,
et al., Appellants and Respondents.

DIVISION OF COUNTY—BOARD OF COMMISSIONERS—CHANGE OF SETTLEMENT—MANDAMUS—CONTROL OF DISCRETION.—*Mandamus* never lies to compel a tribunal to perform in a particular way an act which involves the exercise of discretion and judgment, and will not lie to compel a board of commissioners, appointed to adjust accounts upon the division of a county, which has performed its functions, to resettle and readjust its accounts between the old and the new county in a particular way.

ID.—BOARD FUNCTUS OFFICIO—EXHAUSTION OF POWER.—The board of commissioners, having performed the function for which it was created, is *functus officio*; and its power, being limited to one express object, was exhausted by its exercise.

ID.—POLITICAL ACTION OF LEGISLATURE AND BOARD—JURISDICTION OF COURTS.—The whole matter of the division of a county, and the creation of a new county, and the determination of what, if any, liability there shall be between a new county and the old one from which it is carved, is in its nature political, and not judicial, and belongs wholly to the legislative department of the government. No court exercising either law or equity powers has jurisdiction to control any political action of the legislature or of a board of commissioners established by it as its political agent or instrumentality. A court can only enforce a liability or legal rights expressly established by the legislature.

ID.—JURISDICTION OF EQUITY—FRAUD OR MISTAKE—JURISDICTION OF SUBJECT-MATTER.—A court of equity has jurisdiction in cases of fraud or mistake, provided it has jurisdiction of the subject-matter in connection with which the fraud or mistake occurred; but it has no jurisdiction of the subject-matter of fraud or mistake connected with legislative or political action, which is beyond judicial control.

CROSS-APPEALS from a judgment of the Superior Court of Los Angeles County and an appeal from an order denying a new trial. J. W. McKinley, Judge.

The facts are stated in the opinion of the court.

R. E. Houghton, and J. S. Chapman, for Plaintiff, Respondent and Appellant.

Rodgers & Paterson, and Curtis & Curtis, for Defendants, Appellants and Respondents.

McFARLAND, J.—These appeals are all taken in the same case.

The first (No. 515) is from an order denying the defendants' motion for a new trial; the second (No. 516) is by the same appellants, from the judgment; the third (No. 517) is by the plaintiff from the same judgment.

Under our views of the case, it is not necessary to consider many of the contentions made by defendants. There is a motion by each of the parties to dismiss the other's appeal from the judgment, but we do not think that either is well founded, and they are both denied. In our opinion, the demurrers of the defendants to the complaint should have been sustained on the grounds that it does not state facts sufficient to constitute a cause of action, and that the court had no jurisdiction of the subject-matter of the action.

The litigation grows out of an act of the legislature approved March 11, 1893 (Stats. 1893, p. 158), entitled "An act to create the county of Riverside," etc. By that act the new county of Riverside (plaintiff herein) was created partly out of the territory of the county of San Bernardino (defendant herein). By section 8 of the act, a board of five commissioners was created, to be appointed as therein provided. These commissioners were to ascertain "the indebtedness of San Bernardino County existing at the time this act takes effect, and also the total value of all property at that time belonging to San Bernardino County." They were also to ascertain the total assessed value of all property in San Bernardino County at the time the act took effect, and the assessed value of all property in the territory to be set apart to the new county of Riverside. They were also to find the difference between the existing indebtedness of the old county and the value of the property belonging to it; and if such indebtedness exceeded such value, then Riverside was to pay its proportion of such indebtedness to San Bernardino County, said proportion to be determined by a rule formulated in the act; but if, on the other hand, the value of the property belonging to the old county should exceed its indebtedness, then it should pay to Riverside the latter's proportion of such excess, in accordance with the formula provided as aforesaid. There are some other provisions touching the basis of settlement, not necessary to be here stated. The foregoing is a sufficient statement of that part of the act by which the board of commissioners was appointed. The commissioners, after the completion of their

work, were to certify the result to the boards of supervisors of the two counties. Five commissioners were appointed, in accordance with the act, and after the completion of their work they reported that as the result of their investigation there was a liability from San Bernardino County to Riverside County in the amount of \$15,586.82. Riverside County, not considering this amount sufficiently large, commenced this action.

It is averred in the complaint that several of the findings of the commissioners which were adverse to plaintiff were against the evidence. The two main findings which are thus alleged to be wrong are these: 1. The commissioners found that the indebtedness of San Bernardino County was \$163,719.29; and it is averred that this was not the true amount, that it should have been found to be only \$40,139.42, and that the larger amount was arrived at by including certain salaries and expenses of county officers, which, plaintiff alleges, "upon information and belief," were not "an indebtedness, within the meaning of said act." 2. It was found that the total value of the property belonging to San Bernardino County, when the act took effect, was \$213,526.98, whereas it is stated in the complaint that "plaintiff is informed and believes, and therefore alleges," that the said value was \$465,487.20. It was also averred, upon information and belief, that "the balance of the property of said San Bernardino County" was estimated by the commissioners at a sum greatly below its real value. It was also averred, in general terms, that these alleged improper findings were made fraudulently, and were the result of a conspiracy between the commissioners Barton, Brown, and Stamm, constituting a majority of the board, and who are made defendants, for the purpose of making an adjustment in such manner as to defraud Riverside County out of her just rights in the premises. The prayer is,—1. That the commissioners "be ordered and directed to readjust the said settlement" in accordance with the views of plaintiff; and 2. That the court itself adjust the accounts between the two counties, and give plaintiff judgment against San Bernardino County for \$132,027.09, and "for such other and further relief," etc. The court found mainly in accordance with the averments of the complaint, and, following the first prayer, entered a decree setting aside the acts of the commissioners, and sending the whole matter back to them, with instructions to "readjust the said settle-

ment," and directing them to find, as to several matters in controversy, in a certain way, and differently from the former finding. The judgment is similar to judgments frequently entered by an appellate court when reversing a judgment, where there is a direct appeal authorized by law from the lower to the higher court.

It is clear that the particular judgment rendered in this case cannot stand. It is in the nature of a *mandamus*; and a *mandamus* never lies to compel a tribunal to perform in a particular way an act which involves the exercise of discretion and judgment. Moreover, the board of commissioners, having performed the functions for which it was created, is *functus officio*. Its authority was limited to one express object, and by its exercise it was exhausted.

It is contended, however, by plaintiff, in its appeal from the judgment, that the court itself should have taken hold of the matter, and rendered a judgment adjudicating and settling the questions between the two counties, and that this court should remand the cause for that purpose. It is said that "where the jurisdiction of a court of equity once attaches for any purpose, it will be retained for all purposes, and a final adjudication made of the matter." This may be admitted to be, as a general rule, true. But the difficulty here is to apply to the case at bar the first clause of the proposition, "where the jurisdiction of a court of equity once attaches." There is no magic in the phrase, "a court of equity." Such a court is not unconditioned and infinite. It is, after all, only a court, with such jurisdiction as the laws of the land give it; and when a thing is beyond the jurisdiction of any court, a court of equity can no more take hold of it than can a court of law. Now, it has, we think, been definitely settled in this state, as well as in some other states, that the whole matter of the divisions of counties and the creation of new ones, and what, if any, liability there shall be between a new county and the old one from which it has been carved, is, in its nature, political, and not judicial, and belongs wholly to the legislative department of the government. It is admitted that if an act creating a new county out of an old one says nothing about a division of property or liability, the old one must continue to shoulder all its existing indebtedness, and each piece of public property belongs to the county in which it happens to be situated, and in such case "the old county cannot maintain an action against the new to recover any part of

its existing indebtedness." (*Tulare County v. Kings County*, 117 Cal. 195; see also cases there cited, and *Laramie County v. Albany County*, 92 U. S. 307.) There is therefore no legal liability between the two counties, arising out of the mere fact that one has been carved out of the other, which any court has jurisdiction to adjudicate. The legislature may, however, declare, in the act creating a new county out of the territory of an old one, that certain public property shall belong to one or the other of the counties, or that one shall pay a fixed sum to the other, or be liable for a certain amount of indebtedness, and the liability, when thus created by the legislature, could, no doubt, be enforced by the courts; or the legislature may provide that a certain commission or tribunal, created for the express purpose, may investigate and determine what the liability or division of property shall be; and it may, by a subsequent act, modify its former determination, and change the condition as to liability, division of property, etc., upon which the original act was passed. (*People v. Alameda County*, 26 Cal. 642.) In such case, the commissioners appointed are the mere agents or instrumentalities of the legislature, chosen to aid it in doing what it might have done without them, and their acts are wholly connected with the political department of the government, and are as much beyond the reach of the judiciary as the action of the legislature would have been if it had itself, in the first instance, definitely fixed the actual liability of the two counties. There are no existing legal rights between the two counties, arising out of contract, or otherwise, to be adjudicated by courts, as in cases of conflicts between individuals arising out of the general law touching personal and property rights. Neither county has any right in the premises, except that which is expressly created by the legislative act. If the legislature, in determining what rights it will give, employs the instrumentality of a commission to aid it, the determination of the commission must stand, if the employer is satisfied with it. But the legislature can change whatever has been done in the premises, either directly by itself, or indirectly by its instrumentality; and therefore if one of the counties incidentally affected thinks that it has been unjustly treated by the commission, its complaint must be made to the legislature. There is no appeal from the commission to a court provided for; and, leaving out of sight the action of the com-

mission, there are no legal rights between the counties to be judicially adjudged or enforced.

The foregoing views are in accord with the decision of this court in *Orange County v. Los Angeles County*, 114 Cal. 390. Orange County had been created out of territory formerly belonging to Los Angeles County, and the act creating the new county was similar to the one in question in the case at bar. Commissioners had been appointed to adjust the rights created by the legislative act, and they were, among other things, to determine the amount of property and assets belonging to Los Angeles at the date of the act. In doing so they left out what was clearly an asset of Los Angeles County, amounting to over nineteen thousand dollars, and the suit was brought by Orange County to recover its proportion of that amount. A demurrer to the complaint was sustained in the lower court, and the judgment was here affirmed. The court, in its opinion quoted from *Sedgwick County v. Bunker*, 16 Kan. 498, as follows: "Where a county is divided, the rule for the division and apportionment of the debts and property between such county and the detached territory belongs exclusively to the legislature, and not to the courts; and when the legislature has determined how the debts and property shall be divided and apportioned, the courts cannot interfere." The failure of the commission to include the said asset of Los Angeles County, as above stated, was the result of a mistake; and the court further said, "The mistake was one, however, which, in our opinion, can be corrected by legislative action alone, and not by the courts. The courts are without authority to adjust matters of this character between counties. We conclude, therefore, that the demurrer to the complaint was properly sustained, and that the judgment should be affirmed." Upon a petition for rehearing it was strongly urged that the decision was wrong in holding that "the courts cannot adjust matters between counties; it is a matter for legislative action only"; but the court, in *Bank*, denied the petition. The case was cited with approval in *Tulare County v. Kings County*, 117 Cal. 201, where it was again held that a determination of all matters between a new and an old county "is a legislative and not a judicial function." It was further held in the latter case that the provision of section 3 of article XI of the constitution, to the effect that a new county "shall be liable for a just proportion of the existing debts and liabilities" of the old

one, still left with the legislature the power to determine such just proportion, the court saying, "The whole subject of the wisdom and expediency of creating a new county is a matter addressed to the legislature; the question of what, if any, proportion of the debts of the old should be paid by the new county, with all other questions concerning division, is with the legislature." In the case of *People v. Alameda County*, 26 Cal. 642, the same principle was announced. Five years after the creation of Alameda County out of the territory of Contra Costa County, an act was passed appointing commissioners to determine what amount of money the former county should pay the latter. They fixed an amount, which Alameda County paid. But four years later, the legislature, having determined that Alameda County should pay a further amount, passed another act, appointing another set of commissioners to determine what the additional amount should be, and provided that the board of supervisors of Alameda County should levy a tax to satisfy the amount which the commissioners should find. The commissioners found the additional amount to be \$11,574.20, and the board of supervisors of Alameda County having refused to levy a tax to pay it, a *mandamus* was issued by the superior court commanding them to levy the tax. An appeal was taken, and this court affirmed the judgment. Many points were made by appellant, and, among others, that the act appointing the commissioners, with power to adjust, etc., was unconstitutional, because an encroachment by the legislature upon the judicial department of the government. The case, therefore, covered nearly the whole subject of the power of the legislature in the matter of creating new counties. In answer to the constitutional objection, Sawyer, J., in delivering the opinion of the court, said: "It is objected that in appointing commissioners to ascertain and award the amount to be paid by Alameda County to Contra Costa County, the legislature conferred upon them judicial functions, and thereby usurped powers that, under the constitution, belong exclusively to the judicial department of the government. It will be observed that the money claimed was not a legal demand by one county against another, growing out of contracts or transactions between themselves, which could be litigated between them and enforced by suit in a court of justice. The claim, as between the counties, arose solely out of legislative action in creating the new county of Alameda, in

part, out of the county of Contra Costa, and wholly independent of the action of either county, as between themselves"; and further: "The legislature, then, may, in its discretion, determine the objects for which, and the extent to which, the taxing power shall be exercised, and may apportion the taxes to be levied. In ascertaining the amount that ought equitably to be charged upon the different districts, as a guide to the exercise of this discretion, it may pursue its own methods, *and employ its own instruments.* . . . We think, therefore, the apportionment of the amount to be paid by the respective counties was not an encroachment upon the powers with which the judicial department is charged, within the meaning of the constitution."

In some of the other states, acts creating new counties have either referred adjustment between the counties directly to the courts, or have specially provided for appeals from commissioners. The decision of the supreme court of Texas in *Walker v. Tarrant County*, 20 Tex. 16, is directly in point, and in accord with the views above expressed; for, while the matter involved there was the location of a county seat, the principle announced applies equally to the creation of a county. The court there say: "The act of determining in what particular place in a county the courts shall be held, and the public records shall be kept, is the exercise of a political authority of the government pertaining to the legislature. It may be done directly, as by naming and identifying a place in the act; or it may be done indirectly, by making it depend upon a contingency, and *appointing an agent or agents* to determine upon that contingency, and to announce the result. Whether it be done the one way or the other, it, in all its parts, is no less an act pertaining to the political and not to the judicial authority. The legislature has the power to cause the place to be determined by one contingency as well as another,—by the locality of numerical population, of the property, of the tillable lands or good water, as well as by the qualified voters. If the agents which the legislature may employ do not correctly perform what is required of them, in determining any such contingency upon which it may be made to depend, *the department for complaint and redress is the legislature, that has employed such agent to perform its functions.*"

It is contended that *Orange County v. Los Angeles County*, 114 Cal. 390, is not authority here, because in that case a mistake of the commissioners was involved, while in the case

at bar there is an averment of fraud, and it is said that a court of equity has jurisdiction in all cases of fraud. A court of equity, however, has as complete jurisdiction in cases involving mistakes as in cases involving frauds; but it has not jurisdiction in either instance, unless it has jurisdiction over the subject-matter in connection with which the mistake or fraud occurred. The decision in *Orange County v. Los Angeles County*, 114 Cal. 390, did not rest on the ground that the particular averment there was mistake instead of fraud, but upon the ground that the whole subject-matter was for legislative action, and beyond judicial cognizance.

The case of *Los Angeles County v. Orange County*, 97 Cal. 329, cited by plaintiff, is not in point. In that case a demurrer to the complaint was sustained in the lower court and judgment rendered for defendant, and on appeal the judgment was affirmed. The demurrer was solely upon the grounds of insufficiency of facts, and the statute of limitations. No question of jurisdiction was decided, or discussed, or raised. The decision merely determined the points presented by counsel, and passed upon the constitutionality and meaning of the act there under consideration, but in its opinion it expressed the same views as to the general subject of the creation of counties as those hereinbefore stated.

The judgment and order denying a new trial are reversed and the cause is remanded, with directions to the superior court to sustain the demurrers of defendants to the complaint and to dismiss the action.

Harrison, J., Garoutte, J., Van Dyke, J., and Henshaw, J., concurred.

TEMPLE, J., concurring.—I concur. Conceding, as claimed, that the act of the legislature has so definitely determined the equities and rights of the two counties that a court of equity would have been able to enforce the law and carry out the scheme if no commissioners had been provided, yet that provision itself makes so radical a change, that in case the commission refuses to act, the courts would have no jurisdiction in the premises. For instance, as written, the value of the property belonging to the county is not one of the factors in determining what either county is to pay the other, but the factor is the value of such property as determined by the commissioners.

Besides, by providing for a commission to determine which county shall pay the other, and how much, the legislature has denied the right to sue either county for the purpose of determining the amount.

It is conceded on all hands that the power of the state over these matters is plenary. It is dealing with public funds, and gives or withholds as it pleases, and it can manage these affairs through such agencies as it sees fit to adopt. The act places no obligation upon San Bernardino County until there is a finding or an award made by the commissioners, and then only the duty of complying with the award. It confers no right of action upon Riverside County, unless the right to enforce the award be such. On the other hand, as already suggested, it, in effect, prohibits such action, by confining the remedy to an award or finding to be made by a commission which performs purely political functions which the legislature could have performed itself.

Indeed, the act of the legislature is not a law in the ordinary sense. It declares no rule of action, but is itself a mere governmental act, affecting the government only, and as soon as the act is fully performed, the statute is *functus officio*. A part of this purely political act is the appointment and the action of the commissioners. If the court could set aside the determination, it could go no further, and in this connection it must be remembered no private rights are invaded. The matter is between two agencies of the state, both of which (in this matter) are completely under the control of the state.

Counsel for the county of Riverside rely greatly upon *Johnson v. Tousley*, 13 Wall. 72, and that line of cases, and contend that the commissioner of the general land-office, the registers and receivers, and the Secretary of the Interior, are just as clearly special tribunals for the decision of certain controversies as was the commission here, and yet the courts, it is said, have jurisdiction to correct errors of law committed by such tribunals. The commission created by the act under consideration here is not a tribunal created to determine any controversies, in a proper sense, and yet an examination of those cases will tend to show my position in this matter.

In no one of these cases has the court undertaken to do what the court is asked to do here—to wit, set aside the action of the land department, order the patent canceled, and direct the department to reverse its rulings and issue the pat-

ent to the party which the court finds should have had it. On the contrary, it is held that the court has no power to do so. What it does is simply to affirm the patent issued, and finding that it was issued to the wrong person through mistake or fraud, the patentee is declared an involuntary trustee for the person equitably entitled to it.

No such thing can be done here. To affirm the award is to find that plaintiff has no case. All that could be done, if relief could be had, and all that is sought, is, to have the court do the precise thing which in the entire line of cases cited on this point it is held cannot be done—to wit, set aside the action of the political department, and compel the officers to perform their special functions as, in the opinion of the court, they ought to have performed them. These cases, in my opinion, instead of sustaining the position of the plaintiff, manifest an entirely different view of the law, and render it still more evident that plaintiff cannot maintain its case.

Rehearing denied..

[Crim. No. 755. In Bank.—November 20, 1901.]

THE PEOPLE, Respondent, v. ALBERT C. ENWRIGHT,
Appellant.

CRIMINAL LAW—JURY—SPECIAL VENIRE SUMMONED BY DEPUTY CORONER—CHALLENGE TO PANEL—DEPARTURE FROM STATUTE.—A challenge to the panel of trial jurors, completed upon a special *venire* summoned by a deputy coroner from a list of names from a particular township furnished to him by the coroner, should be allowed, under section 1059 of the Penal Code, on the ground of material departure from the forms prescribed by statute for the drawing and return of the jury.

ID.—MURDER—ERRONEOUS INSTRUCTION AS TO MOTIVE—CASE AFFIRMED.—Upon a prosecution for murder, where the defendant relied wholly upon self-defense, and that the shot was fired to prevent injury to himself, and the testimony was conflicting as to who was the aggressor, and as to whether the shooting was justified, an instruction as to motive, which was an argument for the prosecution, and assumed a contention of defendant's counsel that without proof of motive no crime was shown, and which states that motives were difficult to prove, and suggested that the prosecution

could be aided by the possibility of a concealed motive of which there was no proof, is erroneous, and violative of section 19 of article VI of the constitution. (*People v. Verencesneckochockhoff*, 129 Cal. 497, affirmed.)

ID.—MOTIVE, HOW PROVED.—The motive for a murder may be inferred from evidence which would warrant it, without express proof; but the prosecution cannot be excused from making convincing proof upon the point by proof of the killing and of any circumstances tending to show a wicked or criminal motive or intent.

APPEAL from a judgment of the Superior Court of Mono County and from an order denying a new trial. W. H. Virden, Judge.

The facts are stated in the opinion of the court.

William O. Parker, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

TEMPLE, J.—The defendant was tried for murder, and convicted of the crime of murder in the second degree. He appeals from the judgment and from an order refusing a new trial.

The first point urged arises from a challenge to the panel of trial jurors. Some objection might be urged against the sufficiency of the challenge, because it did not include a statement of the facts constituting the ground of the challenge, as required by section 1060 of the Penal Code. The attorney-general urges no such objection, however, and there is a statement of the facts in the record, which is defective only in that it does not expressly appear to have been a part of the challenge and stated as the ground of it. The challenge was on the ground of a material departure from the mode provided for the drawing and return of the jury, and it was directed against the additional panel summoned by George Hughes, as deputy coroner. The facts stated are: "The regular panel being exhausted, a special *venire* was ordered, and placed in the hands of the coroner, who appointed one George G. Hughes a deputy to go to Antelope township to summon jurors, giving said deputy a list of names to be summoned; said deputy summoned all the persons named in said list who could be found." The district attorney excepted to the challenge, and the exception

was sustained. At least, such is the effect of what was done. The court said, "There is no necessity of ruling upon the challenge; the defendant will have the full benefit of his challenge if there is anything in it," and proceeded to impanel the jury from the list so returned.

That the challenge was authorized for this cause, by section 1059 of the Penal Code, I have no doubt. The section differs much from the provision in regard to the challenge of a grand jury, which was the matter under consideration in *People v. Southwell*, 46 Cal. 142, and in *Bruner v. Superior Court*, 92 Cal. 239.

That the mode adopted for the summoning of the jury was a material departure from the forms of law, and one which may have been quite injurious to the defendant, is manifest from the provisions of section 1064 of the Penal Code: "When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror." The deputy who, as a sort of messenger-boy, served such notice as his principal required, may have been entirely unbiassed, while the principal who selected the jurors to be summoned may have been full of prejudice, and engage to the uttermost of his power in securing a conviction. For the possible effect of such practice, I refer to the opinion of Justice McFarland in the case of *Bruner v. Superior Court*, 92 Cal. 239.

The point that the special *venire* was placed in the hands of the coroner, rather than in those of the sheriff, without any showing why, cannot be raised on this record. No such fact was stated as the basis of the challenge.

The above error is, of itself, sufficient to necessitate a reversal, but since there will probably be a new trial, a further error may be noted. The court gave substantially the same instruction in regard to motive which was held to be erroneous in *People v. Vereneseneckockockhoff*, 129 Cal. 497. It was there declared that giving such an instruction was a violation of section 19 of article VI of the constitution, and was, furthermore, an argument for the prosecution. It assumed that the defendant's counsel was contending that without proof of motive no crime was shown, and it suggested that the prosecution could be aided by the possibility

of a motive in regard to which there was no proof, in determining the vital question of the case.

The defendant, admitting the homicide, contended that it was in necessary self-defense. The evidence was conflicting as to who was the aggressor, and as to whether appearances at the time the fatal shot was fired would justify a reasonable man in believing himself in danger. Defendant testified, in effect, that there was no quarrel between himself and the deceased; that he had no grudge against him, and no desire or motive to injure him, and that while passing peaceably along the street a sudden, unprovoked, and furious assault was made upon upon, and that he found it necessary to shoot the deceased to save himself from serious bodily harm. His evidence differed from that of the prosecution, which tended to show an unprovoked assault on the part of the defendant. The sole defense was that the shot was fired to prevent injury to himself, and for no other purpose. Here the court steps in and tells the jury that motives are difficult to prove, that no one can lay bare the secrets of the mind, and that there may have been a concealed motive, although it was impossible to prove any. This was the ultimate question upon which the jury were to pass. All the evidence, in some sense, bore upon this point, and the jury ought not to have been told that they could imagine the wicked motive without proof.

Of course, such motive could have been inferred from evidence which would warrant it, without express proof. The killing itself, and many circumstances, may have tended in that direction, but this was not the effect of the instruction. Unless it was intended to excuse the prosecution from making convincing proof upon the point, it is impossible to see why it was given.

The judgment is reversed and a new trial awarded.

McFarland, J., Harrison J., Van Dyke, J., and Henshaw, J., concurred.

GAROUTTE, J., concurring.—I concur in the judgment and order of reversal upon the first ground stated.

[Crim. No. 743. In Bank.—November 21, 1901.]

THE PEOPLE, Respondent, v. MANUEL AMAYA, Appellant.

CRIMINAL LAW—MURDER—CHALLENGE TO PANEL—OPEN VENIRES—

BIAS OF SHERIFF—CONTINUANCE OF JURORS SWORN—EXTRA CHALLENGES—WAIVER OF RIGHT TO OBJECT.—Upon a prosecution for murder, where two separate challenges to the panel of talesmen summoned upon open *venires* to complete the jury, for bias of the sheriff, were overruled, and three jurors were impaneled and sworn, and five peremptory challenges exercised thereunder, and a third challenge under the third *venire* was sustained upon further evidence of bias, after which the privilege was conferred upon the defendant to use five additional peremptory challenges, of which he availed himself, without removing any of the three jurors impaneled, such voluntary continuance of those jurors proves conclusively that he preferred them, and deprives him of the right to object to the rulings of the court upon the previous challenges.

ID.—CHALLENGES BY PEOPLE—IMPLIED BIAS OF JURORS—OPPOSITION TO CIRCUMSTANTIAL EVIDENCE—DISQUALIFICATION.—Upon challenges by the people for implied bias of jurors, who stated that they would not base a verdict of guilty upon circumstantial evidence, it cannot be assumed that the case for the people would derive no support from circumstantial evidence. Jurors whose conscience would not permit them to act upon legal evidence in a capital case are disqualified.

ID.—ALLOWANCE OF CHALLENGE NOT SUBJECT TO EXCEPTION.—The ruling of the court allowing a challenge for implied bias of a juror is not the subject of exception.

ID.—EVIDENCE—DYING DECLARATION OF DECEASED—PRELIMINARY PROOF.—The dying declaration of the deceased is admissible evidence, where there is clear preliminary proof that the declaration was made under the solemn belief of impending death, after all hope of recovery had been resigned, and that every precaution was taken to get the written statement correct.

ID.—ACCUSATION BY DECEASED AGAINST DEFENDANT AFTER ARREST—FAILURE TO REPLY—TACIT ADMISSION—QUESTION OF FACT.—Evidence that the defendant, after he was arrested, was brought before the deceased prior to his death, and that the latter pointed to him and said, "There is the man that hit me with a club and shot me," and that the defendant, though fully understanding what was said, and free to reply thereto, made no reply, is admissible, as tending to show a tacit admission of the accusation, the weight of which was a question of fact for the jury.

ID.—ACCUSATION OF CRIME CALLING FOR REPLY—OPPORTUNITY AND FREEDOM TO REPLY—ARRESTED PERSON.—An accusation of crime,

not replied to, to be admissible, must be made under such circumstances as to afford the accused person an opportunity to act or speak with freedom, and the statement must be one naturally calling for some action or a reply. In this state, an accusation of crime calls for a reply, even from a person under arrest, where the circumstances surrounding him indicate that he was entirely free to reply, if he had chosen to do so.

ID.—STATEMENT IN PRESENCE OF ARRESTING OFFICER.—An arrested defendant is not called upon to make any reply to any question or statement directly from the arresting officer; but the fact that he was under arrest, and that an incriminating statement was made by the deceased in presence of the arresting officer, does not make the failure to reply thereto inadmissible evidence, though the importance thereof is to be determined by the jury, in view of all the surrounding conditions. [Per McFarland, J., concurring specially.]

ID.—CROSS-EXAMINATION—IMPEACHMENT OF DYING DECLARATION.—On cross-examination of a witness, who merely testified to what occurred at the bedside of the deceased, it is not proper to show previous contradictory statements of the deceased, made when he first discovered his wounded condition. Such impeachment can only be made by offering the evidence as part of the defendant's case to contradict the dying declaration.

ID.—PRESENCE OF ANOTHER DEFENDANT ON NIGHT OF SHOOTING—CONSPIRACY—CRIES OF MURDER—RES GESTAE.—Evidence that the deceased and another defendant, separately accused of the crime, were playing cards on the night of the shooting, about eleven o'clock, and that about one hour thereafter, cries of murder were heard from the deceased, is admissible, both on the ground of conspiracy, where the dying declaration is evidence of such conspiracy, and as part of the *res gestae*, to establish the time of the assault upon the deceased.

ID.—MISCONDUCT OF PROSECUTING ATTORNEY—UNPROVED MOTIVE OF CRIME—REFERENCE OF CLUB TESTIFIED TO, BUT NOT PRODUCED—RECRIMINATIONS BETWEEN COUNSEL.—An unfounded argument of the district attorney, as to the defendant's motive for the crime being a robbery, is not misconduct. He was justified in alluding to a blood-stained club, proved to have been found in the saloon immediately after the assault, where the testimony shows that the defendant struck and wounded the deceased with a club, though the club was not placed in evidence, or formally offered as an exhibit. Ill-timed recriminations between the district attorney and the counsel for the prisoner are not ground of reversal, where no prejudice to the defendant appears to have resulted therefrom.

ID.—INSTRUCTION—PRESUMPTION OF TRUTHFULNESS OF WITNESS—REBUTTING PROOF—INTEREST AND BIAS.—It is not error to instruct the jury that the presumption that a witness speaks the truth may be repelled by "his interest in the case, or his bias or prejudice against one of the parties," as well as "by the manner in which he testifies," by the character of his testimony, or by evidence affecting

his character for truth, honesty, or integrity, or by contradictory evidence.

ID.—INSTRUCTIONS AS TO DYING DECLARATION.—An instruction stating, in effect, that the jury were not bound by the fact of the admission by the court of the dying declaration of the deceased to conclude that it was made in view of impending death, but that it was for them to determine whether it was so made, and whether it had been correctly reported, is correct, and favorable to the defendant. A requested instruction for the defendant, as to the weight and conclusiveness of dying declarations, and that a dying declaration, alone, will not support a verdict of guilty, was properly refused.

ID.—SUPPORT OF VERDICT—DYING DECLARATION—SILENCE OF DEFENDANT WHEN ACCUSED.—The dying declaration of the deceased, and the silence of the defendant when accused by the deceased, are sufficient to support a verdict of guilty of murder in the first degree, though there is no other tangible evidence against the defendant.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order denying a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Carl E. Lindsay, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General for Respondent.

BEATTY, C. J.—Shortly before midnight of February 10, 1900, Garrett D. Loucks was assaulted, beaten, and shot in his saloon at Santa Cruz. Two days later, he died from the effects of one of the gunshot wounds, and by a dying declaration accused the above-named appellant and one Joseph Teshara of the crime. Appellant and Teshara were separately accused, by information, of the murder, and after separate trials were both convicted. Appellant was first tried, and convicted of murder in the first degree, upon which he was sentenced to life imprisonment. Teshara was next tried, and convicted of murder in the second degree, and sentenced to ninety years' imprisonment. Each defendant has appealed from the judgment against him and from an order denying him a new trial. In many particulars the two cases are identical, and, the appellants being represented by the same counsel, they are submitted as to most of the alleged errors upon the same argument. The more extended and

elaborate statement is contained in the briefs in Teshara's case, but the case of Amaya will be first considered, because it was the first tried in the superior court.

1. It is contended that the superior court erred in overruling certain challenges to the panels of jurors returned upon open *venire*. After five jurors had been selected and sworn to try the case, the general panel became exhausted, and the sheriff was directed to summon ten talesmen from the body of the county. Upon his return of this *venire*, the defendant challenged the panel for bias of the sheriff. (Pen. Code, sec. 1064.) The challenge was denied by the people, but after an examination of the sheriff upon his *voir dire*, the district attorney withdrew his objections and consented that the challenge might be allowed. The court, however, refused to sustain the challenge, and the panel was retained. After it was exhausted, another open *venire* was issued to the same officer for fifteen talesmen. To this panel another challenge was interposed, upon the same ground, and was likewise denied. When this panel was exhausted, a third special *venire* for additional talesmen was issued, and upon its return the panel was again challenged, and upon further showing was by the court sustained. In the mean time, however, three jurors, returned upon the first two special *venires*, had been accepted and sworn to try the case, and five had been challenged peremptorily by the defendant. In view of these facts, the court offered the defendant the privilege of challenging peremptorily the three jurors who had been so sworn, without being charged with such challenges, and also offered the defendant five extra peremptory challenges in place of the five he had exercised upon the talesmen summoned on the special *venires*. The defendant accepted the latter part of the offer, and actually exercised twenty-five peremptory challenges, but he refused to challenge the three jurors who had been sworn. We think this action on his part deprives him of any right to complain of the rulings of the court upon his challenges. Conceding them to have been erroneous, the defendant, by availing himself of the privilege offered him by the court, could have protected himself from any possible prejudice caused by the error. His voluntary acceptance of the jurors, when he could have removed them by a mere request without diminishing the number of peremptory challenges allowed him by the statute,

proves conclusively that they were the jurors he preferred.

2. It is claimed that the superior court erred in sustaining certain challenges by the people to jurors who stated, in effect, that although they were not conscientiously opposed to capital punishment, they would not base a verdict of guilty in a capital case upon circumstantial evidence. Appellant's contention is, that since the evidence against him was direct, and not circumstantial, the conscientious scruples of these jurors had no existence, or, at least, no room for operation in this case. It is a sufficient answer to this argument to say that the court, in ruling upon the challenge, could not assume that the people's case would derive no support from circumstantial evidence. A juror whose conscience will not permit him to act upon legal evidence in a capital case is properly held to be disqualified. Besides, the allowance of a challenge for implied bias is not the subject of an exception. (Pen. Code, sec. 1170; *People v. Arceo*, 32 Cal. 40; *People v. Manahan*, 32 Cal. 72; *People v. Murray*, 85 Cal. 356; *People v. Collins*, 105 Cal. 511; *People v. Durrant*, 116 Cal. 199; *State v. Larkin*, 11 Nev. 326; *People v. Murphy*, 45 Cal. 142.)

3. It is contended that the superior court erred in admitting in evidence the dying declaration of Loucks, for two reasons: 1. Because it was not shown to have been made in view of impending death; and 2. Because the language was dictated by others, and was not the correct expression of his own recollection of the assault.

A careful reading of the voluminous evidence preliminary to the offer of the dying declaration convinces us that these objections are unfounded. It shows very clearly that the declaration was made under the solemn belief of impending death, after all hope of recovery had been resigned, and that every precaution was taken to get the statement correct. The case is widely different from *People v. Fuhrig*, 127 Cal. 412, and more closely resembles *People v. Bemmerly*, 87 Cal. 117, where it was said: "*Aliunde* the written declaration, there is sufficient evidence it was made under a sense of impending death."

4. Within an hour or two after Loucks was shot, the appellant and Teshara were arrested and brought to his bedside, where, in response to questions by the officers, he

pointed to appellant and said, "There is the man that hit me with a club and shot me"; and pointing to Teshara, said, "There is the man that told him to shoot, and shoot to kill." To this statement appellant made no reply, but Teshara said, "Mr. Loucks, you surely are mistaken." Appellant and Teshara were at the time in the custody of a constable and the under-sheriff, and a number of other persons were present, the prisoners being close to the bedside of Loucks, the others standing near. There is no reason to doubt that appellant heard and fully understood the accusation made against him, and that he was as free to reply as a person under arrest ever is. When evidence of these facts was offered by the people, the defendant objected to it as incompetent and hearsay, and because it had not been shown that the circumstances were such that he would feel at liberty to reply, or called upon to make any reply, and because the statement and conversation were in the presence of the arresting officers, and while he was under arrest. This objection was overruled by the court, and the ruling is here assigned as error. It is no doubt true, that, to render evidence of this character admissible, the occasion and the circumstances must have been such as to afford the accused person an opportunity to act or speak, and the statement must have been one naturally calling for some action or reply. (Greenleaf on Evidence, par. 197.) But in this state it has been uniformly held that an accusation of crime does call for a reply, even from a person under arrest. (*People v. McCrea*, 32 Cal. 98; *People v. Estrado*, 49 Cal. 171; *People v. Ah Yube*, 53 Cal. 613.) In other jurisdictions it has been held that silence, when a party is under arrest, does not sustain the hypothesis of acquiescence (Wharton's Criminal Evidence, sec. 680), because the party is not free to speak. The leading authority upon this proposition is *Commonwealth v. Kenney*, 12 Met. 235,¹ in which the opinion of the court was delivered by Chief Justice Shaw. This, I say, is the leading authority, not because it sustains the proposition to its full extent, but only because it is the sole basis of all the subsequent decisions which do fully sustain the proposition. A careful examination of Judge Shaw's opinion, however, will show that he did not decide, or intend to be understood, that the mere fact that an accused person is under arrest will always require the exclusion of statements

¹ 46 Am. Dec. 672.

made in his presence. This is what he says: "In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: 1. Whether he hears and understands the statement, and comprehends its bearing; and 2. Whether the truth of the facts embraced in the statement is within his own knowledge or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances and by such persons as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence: then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them; but in this present case he has reported the facts, on which the competency of the evidence depended, and submitted it as a question of law to the court. The circumstances were such that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer who first brought the defendant to the watch-house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence), was made whilst he was under arrest, and in the custody of persons having official authority. They were made by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer."

From this it appears very clearly that the question was

submitted to the supreme court of Massachusetts to be decided upon the special facts of that case, and that the proposition decided was, merely, that, under all the circumstances there appearing, including the fact of arrest, *the prisoner might well have supposed that he had no right to say anything until regularly called upon to answer*. In other and subsequent cases in Massachusetts, Texas, Iowa, and Missouri, *Commonwealth v. Kenney*, 12 Met. 235,¹ has been construed as holding that the mere fact of arrest is sufficient ground in all cases to exclude statements affecting the accused, made in his presence, and it has been adopted and followed in that sense. We think, for the reasons above stated, that it does not sustain the proposition to which it has been so frequently cited. It does not make the fact that the accused is in custody the final test, but has regard to all the circumstances surrounding him at the time, in determining whether he would feel free to act or reply to the accusation, and this, except as to the preliminary ruling, is a question for the jury, rather than for the court. In the present case we can see no reason to conclude that the court erred in holding that the appellant was entirely free to reply if he had chosen so to do; and, moreover, we do not feel at liberty to disregard the authority of the cases above cited from our own decisions.

5. The defendant's counsel, in cross-examining one of the witnesses who testified to what occurred at the bedside of Loucks, asked him in relation to some previous statements made at the time when Loucks was first discovered in his wounded condition—statements which it is claimed would have contradicted or qualified the accusations he made in defendant's presence. These questions were objected to upon the ground, among others, that it was not proper cross-examination, and upon this ground the objections were properly sustained. If the defendant had offered this evidence as part of his own case, to contradict the dying declaration of Loucks, it would have been clearly admissible, on the authority of *People v. Lawrence*, 21 Cal. 371, but the ruling of the court on the offer as made was correct.

6, 7. The court did not err in overruling the objections to the testimony of Morrissey and Foreman. Morrissey testified that he was in the saloon of deceased, about eleven

¹ 46 Am. Dec. 672.

o'clock on the night of the shooting, and saw him at that time playing cards with Teshara, and Foreman testified that he lived near the saloon, and was awakened a little before twelve o'clock by cries of "murder." The objection to this testimony is, that it bore only against Teshara, and that there was no evidence of a conspiracy between Teshara and defendant. There was, however, evidence of such a conspiracy in the dying declaration of Loucks, and aside from this the facts testified to were of the *res gestae*—they established the time of the assault—a fact of importance in every trial of this kind.

8. There is the usual complaint of misconduct of the prosecuting attorney, but we think that in this case it is scarcely justified. His theory that the motive of the crime was robbery, as put forward in his argument to the jury, may have had no support in the evidence, but an unfounded argument is not misconduct. What he said about the club was not justly subject to criticism. The evidence showed that a blood-stained club was found in Loucks' saloon immediately after the assault—he declared that he was struck with a club—the wound on his head was made by such an instrument, and he declared that defendant was the man who struck him. In view of this evidence, the club would have been properly put in evidence, and the mere fact that it was not formally offered as an exhibit did not preclude reference to it in the argument. The mutual recriminations between counsel for the state and for the prisoner respecting their official and professional methods were certainly ill-timed, but we cannot see how they could have prejudiced the defendant.

9. The court, at the request of the people, gave the following instruction to the jury: "The jury are the sole and exclusive judges of the effect and value of evidence addressed to them, and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the facts as to whether they have spoken the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, or his bias or prejudice against one of the parties, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

The instruction goes beyond section 1847 of the Code of Civil Procedure, in the addition of the words, "his interest in the case, or his prejudice against one of the parties." But it is not error to instruct the jury that the presumption that a witness will speak the truth may be repelled by proof of his interest or bias. It amounts only to telling them that interest and bias may be considered by them in weighing the testimony, as undoubtedly may be done. This instruction is entirely free from the vice infecting those given in *People v. Hertz*, 105 Cal. 633, *People v. Shattuck*, 109 Cal. 681, *People v. Van Ewan*, 111 Cal. 149, and other cases cited by counsel, in which the attention of the jury was directed by the court to the assumed bias and interest of particular witnesses for the defense. Here, the proposition is general and abstract, not indicating any particular witness as being, in the opinion of the court, subject to its application, and it merely states the undoubted truth that the proved interest and bias of witnesses may be sufficient in some cases to overcome the presumption that they have testified truly. The instruction condemned in *People v. Vereneseneckockockhoff*, 129 Cal. 499, was to the effect that circumstantial evidence has greater probative force than direct evidence; it was, in other words, an instruction as to the weight of the evidence—a fault not apparent in this instruction.

The eighth instruction given by the court is too long to quote. In effect, it told the jury that although it was the province of the court to determine in the first instance the admissibility of the dying declaration of Loucks, they were not bound by the fact of its admission to conclude that it was made in view of impending death, etc., but that it was for them to determine whether it was so made, and whether it had been correctly reported. This was a correct statement, and even if it had not been the law, it was entirely favorable to the defendant.

A number of instructions asked by the defendant were refused, or given only in modified form. They related principally to the doctrine of reasonable doubt in its application to this case. It is sufficient to say with respect to these instructions, that although some of those refused might properly have been given, they contained nothing that was not embraced in other instructions that were given. The instructions asked as to the weight and conclusiveness of dying declarations were properly refused. The court cannot instruct as

to the weight of evidence, and we know of no authority holding that a dying declaration, alone, will not support a verdict of guilty.

10. The evidence in the case is sufficient to support the verdict. It is true that the only tangible evidence against the defendant is the dying declaration of Loucks, and his own silence when accused, but we cannot say, as matter of law, that this is insufficient to support the verdict.

The judgment and order appealed from are affirmed.

Garoutte, J., Van Dyke, J., and Harrison, J., concurred.

McFARLAND, J., concurring specially.—I concur in the judgment of affirmance. I also concur in the opinion of the chief justice, except that I fear that what is said in paragraph 4 of the opinion might be construed as including more than I think the law warrants on the subject there discussed. I adhere to my concurring opinion in *People v. Dole*, 122 Cal. 497,¹ to the point that when a person is arrested on a charge of crime, he is not called upon to make any response to any question asked him by the arresting officer, or to any statement made by such officer, and that his refusal to make any reply to anything the officer may say to him is "not a circumstance incriminating the person arrested, and constitutes no evidence against him." If, therefore, in the case at bar, the evidence objected to had only shown that appellant had not made any reply to a question or statement of the officer to the appellant, the allowance of such evidence would have been error. But the incriminating statement was made, not by the officer, but by the deceased; and I do not think that the failure of appellant to make any reply to the deceased is taken out of the category of legitimate evidence by the mere fact that the arresting officer was present. Of course, a jury might attach very little importance to the failure of an accused person to make response to a statement made by any one; but the evidence is admissible, and it is for the jury to determine its significance, considering all the surrounding conditions.

Rehearing denied.

¹ 68 Am. St. Rep. 50.

[Crim. No. 742. In Bank.—November 21, 1901.]

THE PEOPLE, Respondent, v. JOSEPH TESHARA, Appellant.

CRIMINAL LAW—MURDER—CHALLENGE TO JURY PANEL—BIAS OF ELISOR—TEST—EVIDENCE—ERRONEOUS RULINGS.—Upon a challenge to the panel of trial jurors by a defendant charged with murder, for the bias of an elisor appointed by the court to summon talesmen to complete the panel, the test of such bias is the same as that of a talesman. Upon the trial of the challenge, it is error to limit the defendant to mere general questions as to whether the elisor had formed or expressed an opinion or had a bias, and to refuse him the right to ask whether he remembered that the dying statement of the deceased accused the defendant, and whether he believed that the deceased had been murdered, and that the defendant was in the saloon of the deceased shortly before the killing, and as to what witnesses he had heard upon the trial of another defendant accused of the same murder, and whether from what he had heard he would make a fair juror, etc.

ID.—ACCUSATION BY DECEASED IN PRESENCE OF DEFENDANT—DENIAL BY DEFENDANT—HEARSAY.—The statement of the deceased, not made as a dying declaration, but made in the presence of the defendant and another person brought before him, in which he accused them of the shooting, which the defendant denied, is inadmissible hearsay, as against the defendant.

ID.—ACCUSATION, WHEN AND WHEN NOT ADMISSIBLE—EXPLANATION OF CONDUCT—ADMISSION.—In such a case, it is not the accusation merely, but the conduct of the deceased thereunder, as indicating an admission that is evidence, and the only reason for admitting the accusation is to explain the conduct. The accusation is not admissible, where it appears that there was no admission of its truth, either expressly or tacitly, but an express denial thereof.

ID.—REASONABLE DOUBT—IMPROPER MODIFICATION OF REQUESTED INSTRUCTION.—An instruction which is a clearer and more logical statement of the law of reasonable doubt as proposed, than after the modification thereof by the court, if allowed, and not refused as being embodied in the charge, should be given as requested.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order denying a new trial. Lucas F. Smith, Judge.

The main facts are stated in the opinion of the court in the case of *People v. Amaya*, ante, p. 531. Further facts are stated in the opinion of the court in the present cause.

Carl E. Lindsay, for Appellant.

Tirey L. Ford, Attorney-General, and A. A. Moore, Jr., Deputy Attorney-General, for Respondent.

BEATTY, C. J.—This is a companion case to that of Manuel Amaya, just decided, *ante*, p. 531. A few days after the conviction of Amaya, this defendant was tried upon a separate information, accusing him of the murder of Loucks, and he was found guilty of murder in the second degree. His appeal, also, is from the judgment and from an order denying a new trial. In many respects the points made in support of the two appeals are the same, and what has been said in Amaya's case need not be repeated here; but Teshara has some exceptions, not covered by the decision in that case, which we will proceed to consider.

1. In this case, as in the other, it became necessary to summon talesmen in order to complete the jury, and the sheriff and coroner both being disqualified by bias, the special *venire* was issued to one F. K. Roberts, who had served as elisor in Amaya's case. Upon his return of the *venire*, a challenge to the panel was interposed by the defendant, upon the ground of bias of the elisor; and in support of the challenge it was shown that he had been present in court, off and on, during the trial of Amaya's case, and all the time during the last two days of the trial; that he then heard read in evidence the dying declaration of Loucks, and the testimony of Patrick Morrissey,—the most direct and important evidence against Teshara; but, in response to questions by the district attorney, he stated that he had neither formed nor expressed an opinion as to the guilt or innocence of the defendant; that he had no bias against him, and that if he were a juror in the case he could try it fairly, according to the law and the evidence. Upon this showing, the challenge to the panel was overruled; and if the question was merely whether the ruling was sustained by the evidence, it could not be said, as matter of law, that there was no evidence to support it; but there is a very different question raised by the defendant's exceptions to a number of rulings of the court excluding evidence offered in support of the challenge. Many of the questions addressed to the elisor by counsel for defendant, to which objections by the people were sustained, called for evidence clearly relevant to the question of bias, and the rulings thereon are the sub-

ject of exceptions expressly enumerated in the statute. (Pen. Code, sec. 1170, subd. 3.) Among other things, the elisor was asked whether he remembered that Loucks, in his dying statement, accused Teshara; whether he believed that Loucks had been murdered; whether he believed that defendant was in the saloon shortly before the killing; what other witnesses he had heard testify at the trial of Amaya; whether, from what he had heard, he thought he would make a fair juror, etc. If the elisor had been under examination touching his qualifications as a juror in the case, every one of these questions would have been plainly relevant to the question of bias, and the same test in the matter of bias applies to an elisor and a talesman. (Pen. Code, sec. 1034.) The defendant was entitled to a panel of jurors summoned by an impartial elisor, and he had a right to show, if he could, by any competent and relevant evidence, that his challenge should be allowed. To make out his case, he was not limited, as seems to have been held, to such general questions as, "Have you formed or expressed an opinion?" or "Have you a bias?" It was the judgment of the court upon the fact of bias—not the opinion of the elisor—that the defendant had the right to invoke, and as a bias for that judgment the facts called for by the above-quoted questions were material and important.

2. The court also erred in refusing to strike out the evidence of Patton and Mullen as to the accusation made by Loucks, when Amaya and defendant were brought to his bedside. The statement made by Loucks at that time was hearsay, and Teshara made no admission of its truth, either expressly or tacitly. He expressly denied it. The court and the district attorney seem to have lost sight of the fact that it is not the accusation, but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct. The district attorney should not have offered this evidence, knowing, as he did, that Teshara had not remained silent under the accusation, but had repelled it at the time it was made. It was, moreover, entirely superfluous, because it was substantially repeated in the dying declaration of Loucks, which was not hearsay, or, at least, not incompetent evidence.

3. The evidence of John Frejola was wholly irrelevant, and should have been stricken out, but the error in admitting it was probably harmless.

4. It seems to be conceded by the attorney-general that it was misconduct on the part of the district attorney to persist in commenting upon the failure of the defendant to testify in respect to certain matters, but he contends that no proper objections or exceptions were taken at the time, and that the matter is not the subject of review, for that reason. We think the objections were sufficient to have called for earlier interference on the part of the court, but it is unnecessary to decide this question, since judgment must be reversed upon other grounds, and it may be hoped that at the next trial the zeal of the district attorney will not lead to a similar transgression.

5. Instruction 23, as requested by defendant, might perhaps have been properly refused upon the ground that it was substantially embraced in other instructions on the subject of reasonable doubt, but if allowed, should have been given as requested. It was a clearer and more logical statement of the law as proposed, than it was after the modification made by the court.

The judgment and order appealed from are reversed and the cause remanded.

McFarland, J., Temple, J., and Van Dyke, J., concurred.

CXXXIV. CAL.—35

[Sac. No. 855. In Bank.—November 21, 1901.]

A. G. SCHLOESSER, Respondent, v. J. S. OWEN, Appellant.

APPEAL—MOTION TO DISMISS—EXTENSION OF TIME TO FILE UNDERTAKING—POWER OF COURT.—The court or judge has power to extend the time allowed by statute in which to file the undertaking on appeal, and the fact that it was not filed until thirty days after the service of the notice of appeal is not ground for a motion to dismiss the appeal, where it appears that it was filed within the time properly allowed by order of the judge of the court.

ID.—PROOF OF SERVICE OF NOTICE—AMENDMENT OF DEFECT.—A defect in proof of the service of the notice of appeal may be supplied by leave of the court at the hearing of a motion to dismiss the appeal.

MOTIONS to dismiss appeals from a judgment of the Superior Court of Lassen County and from an order denying a new trial. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

C. L. Claffin, J. T. Boyd, and W. M. Boardman, for Appellant.

Goodwin & Goodwin, and N. J. Barry, for Respondent.

BEATTY, C. J.—Motions to dismiss appeals from the judgment and order denying a new trial. The undertaking on the appeal from the judgment was not filed until thirty days after the notice of appeal was served and filed, but it was filed within the time as extended by order of the judge of the court, and it has been decided that the court or judge has the power to make such an order. (*Wadsworth v. Wadsworth*, 74 Cal. 104.) That decision has never been questioned, and we see no reason to question it. The proof of service of the notices of appeal, if defective originally, is cured by the affidavit filed in pursuance of leave granted at the hearing.

The motions are denied.

McFarland, J., Garoutte, J., Harrison, J., Temple, J., and Van Dyke, J., concurred.

[S. F. No. 1859. Department One.—November 21, 1901.]

CAROLINE WINGERTER, Respondent, v. CITY AND
COUNTY OF SAN FRANCISCO, Appellant.

ESTATES OF DECEASED PERSONS—FEES PAID UNDER MISTAKE OF LAW—UNCONSTITUTIONALITY OF AD VALOREM FEES—ACTION BY DISTRIBUTEE.—Fees paid by an executor to the county clerk on the appraised value of the property of the deceased testator, under the act of March 28, 1895, which was subsequently held unconstitutional by this court, as to such fees, cannot be recovered back from the city and county because of such subsequent decision. The payment was according to the understanding of the parties as to the law prevailing at the time, and the subsequent decision by this court does not create such a mistake of law as a court will rectify.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

Franklin K. Lane, City and County Attorney, and Hugo K. Asher, Assistant, for Appellant.

Otto tum Suden, for Respondent.

HARRISON, J.—An act of the legislature, approved March 28, 1895, entitled "An act to establish the fees of county, township, and other officers, and of jurors and witnesses in this state" (Stats. 1895, p. 267), directed the county clerk, upon the filing of the inventory and appraisement in the administration of an estate, to charge and collect the sum of one dollar for each thousand dollars of the appraised valuation in excess of three thousand dollars. The executor of the last will and testament of Charles J. Wingerter filed the inventory and appraisement of the estate of his testator with the county clerk of San Francisco, August 12, 1895, and paid to that officer the sum of \$325 as the fee for filing the same. June 2, 1897, the estate of the said testator was distributed to the plaintiff herein. In May, 1897, this court held that the above provision of the act of March 28, 1895, was unconstitutional. (*Fatjo v. Pfister*, 117 Cal. 83.) The present action was brought by the plaintiff in August, 1898, to recover the amount so paid for filing

the inventory, alleging in her complaint that it was paid under a mutual mistake of the executor and the clerk in believing that the statute was constitutional and valid. A demurrer to the complaint on the part of the defendant was overruled by the superior court, and the present appeal is from the judgment entered thereon.

Section 1578 of the Civil Code, upon which the plaintiff relies for recovery, is contained in the chapter relating to "consent," in the article upon contracts, and is explanatory of section 1567, which declares that an apparent consent is not real or free if obtained through "mistake." A contract thus obtained may be rescinded (sec. 1689), or its enforcement may be defended at law or enjoined in equity. The section cannot be invoked to sustain an action for the recovery of taxes or other public debts voluntarily paid under a statute which is afterwards declared to be unconstitutional. In *Cooley v. County of Calaveras*, 121 Cal. 482, it was said: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." Under the rule there declared, the plaintiff is not entitled to a recovery. The mistake relied on in *Rued v. Cooper*, 119 Cal. 463, cited on behalf of the plaintiff, was held not to be a mistake of law, and the decision was placed upon the ground that by virtue of section 1542 of the Civil Code the release given to the plaintiff did not include the claim sued upon.

The judgment is reversed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1920. Department One.—November 21, 1901.]

RUTH HARRISON, Administratrix, etc., Appellant, v.
SUTTER STREET RAILWAY COMPANY, and NA-
TIONAL BREWING COMPANY, Respondents.

ACTION FOR DEATH—COLLISION OF STREET-RAILWAY CAR WITH BREWERY WAGON—INSTRUCTION—PRESUMPTION OF NEGLIGENCE—QUESTION OF FACT.—In an action by an administratrix against a street-railway company and a brewery company to recover damages for the death of a passenger upon a street-car, resulting from a collision between the car and a brewery wagon, it was proper to refuse an instruction that there was a presumption of negligence against both companies defendant from the fact of the injury to the deceased, in the absence of a concession that the instrumentalities of both defendants caused the injury. In such case, what instrumentality or instrumentalities caused the injury is a question of fact for the jury.

ID.—BASIS FOR PRESUMPTION OF NEGLIGENCE FROM INJURY—APPLICABILITY OF PRESUMPTION—INDEPENDENT DEFENDANTS—OPEN QUESTION.—The presumption of negligence from the fact of injury is based upon probability, and only arises where the injury results from the management and control by the defendant of the thing which caused the injury, and cannot apply as against a defendant who did not have such management and control, nor in favor of a plaintiff who seeks to recover damages for injuries against two defendants who are wholly independent of each other, where it is an open question as to which defendant had control of the particular instrumentality that caused the injury.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

William H. Jordan, and Anson Hilton, for Appellant.

Naphtaly, Freidenrich & Ackerman, for Sutter Street Railway Company, Respondent.

Marcus Rosenthal, Dunne & McPike, and P. F. Dunne, for National Brewing Company, Respondent.

GAROUTTE, J.—This is an action for damages for personal injuries, brought by the administratrix of the estate of John B. Harrison, deceased. Harrison was a passenger

upon a street-car of defendant the Sutter Street Railway Company. As the car was passing westward upon Pacific Avenue, a collision occurred between the car and a brewery wagon belonging to the National Brewing Company, and as a result of the collision, Harrison, the passenger, was killed. The street-car company and the brewing company are made defendants in the action. Judgment went in their favor, and plaintiff prosecutes this appeal.

A pure question of law is presented by the record, and it arises upon the giving of certain instructions by the court, and its refusal to give others. Counsel for plaintiff, in his brief, thus declares the legal proposition involved upon the appeal: "Of the three instructions asked by the plaintiff and refused by the court, one point was sought to be impressed upon the jury,—namely, that when the plaintiff had shown the fact that the deceased was a passenger upon the car of the defendant railway company; that an accident had occurred; that the deceased had suffered injury thereby, and the extent thereof, all without fault on his part, and that both defendants were involved in the accident,—a presumption of negligence arose as against them both, which it was incumbent upon them to rebut. The instructions by the court at the request of the defendants are directly opposed to this view, and the determination of the propriety of the action of the court in refusing to give the instructions asked by the plaintiff, and giving those asked by the defendants, is the principal matter involved in this appeal."

The general principle of law illustrated by the declaration *res ipsa loquitur* is not gainsaid by respondents, but the application of that principle to the facts of this case is denied. This general principle is fully considered in *Judson v. Giant Powder Co.*, 107 Cal. 549,¹ and nothing need here be said upon that question, other than to restate the rule in its broadest terms. It is thus declared by Shearman and Redfield on Negligence (sec. 59): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Do the facts of this case bring

it within the principle of law declared? The court is convinced to the contrary. In the case at bar it cannot be said that the management of the car caused the injury. Neither can it be said that the management of the brewing company's wagon caused the injury. It therefore follows that the court cannot say which instrument caused the injury, the car or the wagon. If it was the wagon, it was an instrumentality not under the management of the railway company, and if it was the car, it was an instrumentality not under the management of the brewing company. And in either case, as to the other defendant, the rule of law here laid down by the law-writers cannot be made applicable to the facts.

Plaintiff declares that under this rule a presumption of negligence arose against both defendants. This cannot be true. Possibly the driver recklessly drove his wagon against the car, or possibly the gripman of the car intentionally drove his car against the wagon. Under either of these alternatives, it cannot be said that the innocent party was *prima facie* guilty of negligence by reason of the collision. It is thus plain that the facts of the case cannot be made to fit the legal principle invoked. The presumption of negligence cannot arise in this case against both defendants, unless it be first conceded that both the car and the wagon were joint instrumentalities in causing the injury; and this was a question of fact for the jury. In the illustration given, but one of these instrumentalities caused the injury, and therefore the facts of the case put it outside of the principle invoked as to the presumption of negligence.

The authorities fully support the conclusion reached. In *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, the court said: "A *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control." In *Tomkins v. Clay Street R. R. Co.*, 66 Cal. 163, upon a state of facts similar to those here presented, it was held error in the trial court to refuse the following instruction: "If you find from the evidence that the plaintiff was a passenger on the street-car of the defendant the Sutter Street Railroad Company, then I instruct you that no presumption of negligence as against the Clay Street Hill Railroad Company

arises from the fact of the injury, and that the plaintiff must show by a preponderance of the testimony that the defendant the Clay Street Railroad Company was guilty of negligence." In holding this instruction to be good law, the court said: "The appellant was entitled to have the attention of the jury called to the point, that, in considering the evidence, the mere circumstance that plaintiff had been injured as a result of the collision did not create a presumption of negligence on appellant's part." In that case the Clay Street Railroad Company stood in the position of the brewing company in this case, and the authority is square upon the point that, as to the brewing company, negligence could not be presumed from the fact of the collision. It is unnecessary to pursue the investigation of this question further. The bed-rock of this principle of presumption of negligence arising from the fact of the injury is that of probabilities, and in the very nature of things it cannot be made to apply in favor of a plaintiff seeking to recover damages for injuries against two defendants wholly independent of each other, it being an open question as to which defendant had control of the particular instrumentality that caused the injury. If it were a conceded fact in such a case that the instrumentalities of both defendants caused the injury, probably the principle could be applied, but not otherwise.

There is nothing further in the record demanding extended consideration.

For the foregoing reasons the judgment and order are affirmed.

Harrison, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[Sac. No. 834. Department Two.—November 21, 1901.]

J. D. BYERS et al., Appellants, v. COLONIAL IRRIGATION COMPANY OF HONEY LAKE VALLEY, Respondent.

WATER RIGHTS—FORMER ADJUDICATION—CHANGE OF PLACE OF DIVERSION.—In an action by riparian owners to enjoin the diversion of waters to which the plaintiffs were entitled, a former adjudication, giving to the defendant's predecessors the right to divert the waters of a river above its junction with a creek, subject to the condition of leaving specified amounts of water in the stream above that point, does not, of itself, confer the right to take any water below the junction; but, under sections 1412 and 1413 of the Civil Code, the point of diversion may be changed so as to take the amount of water to which defendant is entitled below the junction, provided the rights of the plaintiffs are not interfered with.

ID.—INJUNCTION—PARTIAL NUISANCE—ABATEMENT OF DAM NOT AUTHORIZED.—Where the dam of the defendants is not found to be a nuisance in itself, but only that it is a nuisance as it has been used to interfere with the plaintiff's rights, the court would not be justified in directing its total abatement or removal; but it is sufficient that the defendant be enjoined from using the dam in such manner as to make it a nuisance by such interference.

ID.—DEFECTIVE DECREE—INTERFERENCE WITH PLAINTIFFS' RIGHTS.—A decree merely enjoining the defendant from using the dam in the future "as it has been heretofore maintained and used," is defective in not enjoining the defendant from maintaining or using the dam in such manner as to interfere with the plaintiffs' rights, and from diverting from the stream and from the plaintiffs' lands any of the waters of the stream to which, as found, the plaintiffs are entitled.

APPEAL from a judgment of the Superior Court of Lassen County. Stanley A. Smith, Judge presiding.

The facts are stated in the opinion of the court.

Goodwin & Goodwin, for Appellants.

E. V. Spencer, N. Soderburg, and W. F. Williamson, for Respondent.

THE COURT.—The plaintiffs appeal from a judgment in their favor, claiming that on the findings a different judgment should have been entered. The case as shown by the findings is as follows: The plaintiffs are the owners of several tracts of land, described in the complaint, lying in

one body on the west shore of Honey Lake, in Lassen County, through which there flows easterly into the lake, through several channels, the stream known as Susan River, and the suit was brought to enjoin the maintenance of a dam lately constructed by the defendant in the river, to the west of plaintiffs' lands, and just below the mouth of a confluent known as Willow Creek, and to have the same abated as a nuisance.

The findings of the court; so far as material to the question involved, are, that the plaintiffs are the owners, as riparian proprietors and by appropriation, of the right to use the waters of Willow Creek, and also the waters of Susan River, except certain of its waters subject to diversion by the defendant, above the junction of the streams, as adjudicated in a former decree, and, as conclusion of law, that they are entitled to the unobstructed flow to their lands of all the waters of Willow Creek, and of the waters of the river, except those subject to the defendant's right of diversion, as defined in the former decree; "that the said dam, as constructed, maintained, and used, obstructed the natural and regular flow of the waters of Willow Creek and Susan River to plaintiffs' lands, . . . and diverted from said stream at said point large quantities of said waters, and deprived plaintiffs of the use thereof, to their several great and irreparable injury"; and that the defendant, at the time of the commencing the suit, "then was and still is so maintaining and using, and threatening to so use and maintain, said dam so as to obstruct the plaintiffs in their several beneficial uses of the waters of said stream," etc.; "that the dam complained of . . . enables the defendant to divert, at the site thereof, and use the waters of Susan River, which it is entitled to store and use under the terms of the decree hereinbefore set out; but the defendant has so used, and threatens to so use, said dam as to obstruct the flow of the waters of Willow Creek and Susan River to plaintiffs' lands," etc.; and as conclusion of law the court finds that "the dam complained of, . . . as maintained and used by the defendant, is a nuisance to said plaintiffs," etc., "and that they are entitled to a perpetual injunction restraining the defendant, its agents," etc., "from maintaining said nuisance, and from in any manner diverting from said stream," etc., "any of the waters to which plaintiffs are entitled, as aforesaid."

The judgment entered was, that the dam complained of "is, as it has heretofore been maintained and used, and as it is now maintained and used, by the defendant, a nuisance to the plaintiffs, and to each of them, and interferes with the comfortable enjoyment of their, and each of their, property in and to the waters of said Willow Creek and Susan River," and that the defendant, its agents, etc., be, "and are hereby, perpetually enjoined from maintaining and using said dam in the future as it is now, and as it has heretofore been, maintained and used."

The plaintiffs claim that on the facts found the judgment should have been for the abatement of the dam, and also that defendant should have been enjoined from diverting any water from the river below its confluence with Willow Creek.

With regard to the latter point, it is clear that the right adjudicated to the defendant's predecessors by the former decree was merely the right to divert the waters of the river above its junction with Willow Creek; for the right was subject to the condition that there should be left in the stream above that point, during the months of March, April, May, and June of each year, 1,000 inches of water measured under a four-inch pressure, and at other periods 250 inches. It cannot be claimed, therefore, that the defendant derived from the decree any right to divert the water of the river below the mouth of Willow Creek; and still less that it could thus acquire any right to divert the waters of that creek, or to obstruct them. But, under the provisions of sections 1412 and 1413 of the Civil Code, it had the right to change the point of diversion, provided the plaintiffs were not injured by the change; and there is nothing in the findings to indicate that the water to which the defendant was entitled could not be diverted at the dam without such injury.

As to the former point, it is not found that the dam is a nuisance in itself, but only that it is a nuisance as it had been used, and the court would not have been justified in directing its total abatement or removal. In such cases "a total destruction of the property should not be decreed." It is sufficient that the party be enjoined from using the structure complained of in such a manner as to make it a nuisance (*Fresno v. Fresno Canal etc. Co.*, 98 Cal. 183, 184; *McMenomy v. Baud*, 87 Cal. 134; *Lorenz v. Waldron*, 93 Cal. 249.)

But the decree in this case is defective in not conforming to this condition. The defendant is enjoined merely "from maintaining and using the dam in the future as it has heretofore been maintained and used"; and it is clear that the manner of use might be varied without relieving the plaintiffs from the injuries suffered. The defendant should have been enjoined—as, in effect, provided in the conclusion of law—from maintaining or using the dam in such a manner as to interfere with the plaintiffs' rights, and from diverting from the stream and the plaintiffs' lands any of the waters of the stream to which, as found, they are entitled.

The cause is therefore remanded, with instructions to the lower court to amend the judgment by striking out the words, "are hereby perpetually enjoined from maintaining and using said dam in the future as it is now, and as it has heretofore been, maintained and used," and by inserting in lieu thereof the following: "are hereby perpetually enjoined from maintaining and using said dam in the future in such a manner as to obstruct the flow to the plaintiffs' lands of the waters of Willow Creek, or those of Susan River, to which the plaintiffs are found to be entitled, and from diverting the said waters from the plaintiffs' lands, or in any way depriving them thereof, and from maintaining and using said dam so as in any way to interfere with the rights of the defendant as determined and defined by the findings and by this judgment"; and as thus amended the judgment is affirmed.

[Sac. No. 688. In Bank.—November 22, 1901.]

E. J. CROLEY, Respondent, v. CALIFORNIA PACIFIC
RAILROAD COMPANY, Appellant.

**PUBLIC BRIDGE BETWEEN COUNTIES—POWER OF SUPERVISORS—CONTRACT
WITH RAILROAD COMPANY—MONEY PAYMENT—BINDING CONTRACT.**

—The boards of supervisors of adjoining counties have authority to contract with a railroad company for the payment of different sums of money from each to the railroad company to aid it in the construction of a new bridge across a river, constituting a boundary between the two counties, so as to make a separate roadway for teams and footmen, and another underneath, for the use of the railroad company, which new bridge is designed to replace an old dilapidated bridge, which had been long used both by the railroad company and the public, and which was less convenient and more dangerous to the public. The contract by the supervisors to pay the money so agreed to be paid to the railroad company, which constructs the bridge as agreed, is binding upon the county.

ID.—STATUTORY CONSTRUCTION—LIMITATIONS UPON POWER OF SUPERVISORS—COUNTY GOVERNMENT ACT INAPPLICABLE—POWER UNDER POLITICAL CODE.—Section 25 of the County Government Act, defining the power of supervisors to build bridges within the county, and placing certain limitations upon their authority, therein set forth, only applies to bridges built "within the county," and has no application to a bridge constructed across a river which is the boundary between two counties. The latter case is governed by section 2713 of the Political Code, which is plenary in its terms, and does not limit the power of the supervisors either in the extent or mode in which it is to be exercised, and does not require that the entire cost of construction thereof shall be borne by the counties, or that the ownership thereof shall be vested in them; and the extent and mode of exercising the power is to be determined by the respective boards in each case.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. John Hunt, Judge presiding.

The facts are stated in the opinion of the court.

A. L. Hart, and Peter F. Dunne, for Appellant.

Holl & Dunn, for Respondent.

HARRISON, J.—In 1893 the appellant contemplated the construction of a new railroad bridge across the Sacra-

mento River, at the city of Sacramento, and in response to an invitation from the board of supervisors of the county of Sacramento, its engineer appeared before that board and outlined the character and estimated cost of the bridge. There was at that time a bridge across the river, about four hundred feet above the place contemplated for such construction, which had been built many years prior thereto, and which had been used as a railroad bridge by the appellant, and also by the people of Sacramento and Yolo counties, for the passage of teams and vehicles, and alongside of which there was also a foot-path for individual travelers. This bridge had become quite dilapidated, and the new bridge was intended to replace the old one, and also to afford relief from a congested travel over the bridge between the two counties, and obviate the danger of accidents from moving trains. For this purpose the appellant proposed to construct a separate roadway for teams and footmen, and a special roadway underneath the above for its own use, and it gave to the board an estimate of the amount which the overhead wagon and foot bridge would cost, and the benefit to the county by reason of the construction of such bridge, and desired to ascertain whether the county was willing to aid in its construction. Thereafter, December 5, 1893, the board of supervisors, upon a consideration of this proposition, adopted a resolution, which was entered upon its records, by which it appropriated the sum of thirty thousand dollars to assist the appellant in the construction of the bridge, to be paid to it as follows: fifteen thousand dollars upon the signing of the contract by the company, and the remainder upon the completion of the bridge. A copy of this resolution was delivered to the appellant, and in response thereto, on December 7th, it gave to the board a written notice of its acceptance of the offer, and agreed to "construct and maintain, in connection with said new railroad bridge, an overhead or separate roadway, to be maintained by the California Pacific Railroad Company, for free public highway purposes, and to be independent of either tracks or trains," and that it would prosecute the construction of the bridge with diligence, and finish its construction on or before December 31, 1895. After the receipt of this notice the board of supervisors, on December 14th, adopted the following resolution, which was spread at length upon its records:—

"Resolved, That the communication received this day from the California Pacific Railroad Company, accepting the offer of this board of thirty thousand dollars heretofore made to the said company for the construction of a bridge over the Sacramento River, according to the plans heretofore submitted by Engineer Wilkinson of said company, and it appearing to the board that the terms of acceptance of said offer are in accordance with the intention and understanding of the board, it is ordered that said letter of acceptance be received, filed, and entered in full upon the minutes, and that the said California Pacific Railroad Company is authorized to present its demand for said sum in accordance with said offer heretofore made to said company."

The first installment of fifteen thousand dollars was thereupon paid to the appellant, and it thereafter constructed the bridge, and completed the same December 16, 1895. Thereupon the old bridge was destroyed.

October 29, 1895, the plaintiff herein, as a taxpayer of the county of Sacramento, commenced the present action to enjoin the payment of the installment of fifteen thousand dollars agreed to be paid upon the completion of the bridge, upon the ground that the appropriation of said money by the board of supervisors to aid the appellant in constructing the bridge was illegal and void, alleging in his complaint, as grounds for the relief sought, that the board of supervisors did not advertise for bids for the construction of the bridge, or for plans and specifications thereof, and that no plans or specifications or working details for the construction of the bridge were furnished by the appellant or adopted by the board of supervisors, and that no bond was required to be executed, or was executed, by the appellant for the faithful performance of any contract for the building of the bridge; also, that no contract for the construction of the bridge was entered into between the appellant and the said board of supervisors. The cause was tried by the court, and judgment rendered in favor of the respondent, from which and from an order denying a new trial the railroad company has appealed.

That the negotiations between the appellant and the board of supervisors resulting in the offer on the part of the county to pay to the appellant the sum of thirty thousand dollars towards the construction of the bridge, and

the acceptance of that offer by it, and its subsequent compliance with its agreement for the construction of the bridge, would have constituted a binding contract between two individuals capable of contracting, is a proposition not open to discussion. It is contended, however, on the part of the respondent, that the county of Sacramento is not liable for the act of its board of supervisors in agreeing to pay this money, for the reason that the board did not comply with the statutory provisions in reference to the construction of a bridge by a county. In support of this contention it relies upon subdivision 4 of section 25 of the County Government Act of 1891 (Stats. 1891, p. 300), wherein it is provided that when the cost of the construction of any bridge exceeds the sum of five hundred dollars, the board "must advertise for bids, together with plans and specifications, strain-sheets, and working details thereof, and shall let the contract therefor upon the plans adopted by them, which shall be attached to and made a part of such contract; and the person or corporation whose plans are adopted, and to whom the contract is awarded, shall be required to execute a bond, to be approved by said board, for the faithful performance of such contract"; and contends that inasmuch as this was not done, the agreement to pay the money was illegal and void.

Section 25 of the County Government Act defines the powers of the boards of supervisors in their respective counties, and subdivision 4 of the section confers upon them the power to erect and maintain bridges "within the county." The requirement of this subdivision, above quoted, that the board shall advertise for bids, together with plans and specifications, and shall require a bond for the faithful performance of the contract, is contained in a proviso to the authority which the statute has conferred upon the board for the construction of bridges, and as that authority is limited to the construction of bridges "within the county," the terms contained in the proviso are also limited to the construction of such bridges. The Sacramento River is the boundary between the counties of Sacramento and Yolo, and as the bridge in question is not "within the county" of Sacramento, the above provision in subdivision 4 has no application. As one half of a bridge to be constructed over a river which is the boundary between two counties would be in each county, it is readily seen that its construction cannot be carried out under the provision of that subdivi-

sion. It is also evident that neither county would have the right to construct a bridge beyond its own boundary line, and there is no provision in the subdivision for any concert of action between the boards of the two counties, or for harmonizing any difference between them, if such should exist.

Section 2713 of the Political Code provides: "Bridges crossing the line between counties must be constructed by the counties into which such bridges reach, and each of the counties into which any such bridge reaches shall pay such portion of the cost of such bridge as shall have been previously agreed upon by the board of supervisors of said counties." As the County Government Act contains no provision in reference to the construction of such bridges, this provision of the Political Code is not superseded thereby, but is still in full force. The provision is plenary in its terms, and we have been cited to no provision which limits the authority of the board of supervisors thus given, either in the extent or mode in which it is to be exercised. The statute does not, in terms, require that the entire cost of the construction of such a bridge shall be borne by the counties, or that when constructed its ownership shall be vested in them. The purpose of the statute conferring this authority upon the counties is to provide facilities for travel and intercourse between different parts of the state, and if such facilities can be secured by a contribution on the part of the counties towards the cost of the construction of a bridge, whereby ample and unimpeded intercourse may be had, the purpose of the statute is accomplished. Subdivision 35 of section 25 of the County Government Act gives to the board of supervisors of each county power "to do and perform all other acts and things required by law, not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." The above provision of the Political Code imposes a duty upon the legislative authority of the county government, and is also an act "required by law, not in this act enumerated." As this section of the Political Code imposes this duty upon boards of supervisors, and confers upon them the power to perform the act, but does not prescribe the mode in which the power shall be exercised, such mode, as well as the extent of its exercise, is to be determined by the respective boards in each particular case. It was shown

that an agreement similar to the one under consideration had been made by the appellant with the county of Yolo for the payment by that county of the sum of ten thousand dollars towards the construction of the bridge.

We hold, therefore, that, under the foregoing provisions, the board of supervisors had full power and authority to make the agreement in reference to the construction of the bridge, and that its promise to pay the appellant the money therein agreed by it is binding upon the county.

The judgment and order are reversed.

Garoutte, J., Van Dyke, J., McFarland, J., Beatty, C. J., and Temple, J., concurred.

[L. A. No. 957. Department One.—November 22, 1901.]

THE STEARNS RANCHOS COMPANY, Respondent, v.
S. G. McDOWELL et al., Defendants. ANNA MAUDE
McDOWELL, Appellant.

VENDOR AND PURCHASER—ACTION TO FORECLOSE CONTRACT OF SALE—

DISCLAIMER—ADVERSE CLAIM OF CO-DEFENDANT.—In an action by a vendor to foreclose a contract of sale by reason of the default of the purchaser in making payments thereon, where a co-defendant, who was joined as an alleged claimant under the contract, disclaimed any interest therein, and set up a claim of title adversely both to the vendor and to the purchaser, such adverse claim is not a proper subject of litigation in the action.

ID.—DETERMINATION OF ADVERSE CLAIM—VOID JUDGMENT—MODIFICATION UPON APPEAL.—A judgment in such action, foreclosing the contract of sale as to all of the defendants, and enjoining the defendants from setting up any claim adverse to the plaintiff, and awarding to the plaintiff possession as against the defendants, is void as to the defendant who disclaimed all interest under the contract, and asserted the adverse claim. The judgment being broad enough in its terms to include the adverse claim, though void in relation thereto, will be ordered modified, upon appeal of the defendant who asserted it, so as to exclude such defendant from the operation of the judgment.

APPEAL from a judgment of the Superior Court of Orange County. J. W. Ballard, Judge.

The facts are stated in the opinion of the court.

F. O. Daniel, for Appellant.

E. W. McGraw, and R. Melrose, for Respondent.

GAROUTTE, J.—This action was brought to foreclose a contract made by plaintiff with the defendant S. G. McDowell for the sale of real estate, McDowell having failed to make the payments provided for by the contract. Plaintiff made appellant, Anna Maude McDowell, a defendant, alleging that she claimed some interest in said lands under S. G. McDowell. The answer of appellant denied that she claimed any interest in the land under the defendant S. G. McDowell, and alleged that she was the owner of one half of the aforesaid land, holding the same adversely to plaintiff and defendant S. G. McDowell, and setting out her claim of title. Upon this allegation she asked to be dismissed from the suit. At the trial, the court made findings of fact to the effect that appellant did not claim any interest in the land under McDowell; and in its conclusions of law held that her adverse claims of title were not the subject of adjudication in the action. By the final decree it was ordered, adjudged, and decreed that all of the defendants, including this appellant, “be, and they are hereby, finally foreclosed of all right and interest in and to the lands in said former decree and hereinafter mentioned, . . . and that the plaintiff be, and it is hereby, fully restored to the estate in said lands held by it previous to the execution of said contract; that all claims of defendants, and each of them, in and to said lands adverse to plaintiff are henceforth null and void; and that each of said defendants be, and they are hereby, debarred and enjoined from asserting any claim whatever in or to said lands or premises, or any part thereof, adverse to plaintiff”; and it was also ordered that plaintiff have and “recover judgment against said defendants for the possession of said lands and premises, and that a writ of restitution issue therefor.”

Appellant, having disclaimed any interest in the land under the McDowell contract, and the adverse claims set up by her not being proper matters to be litigated in the action, and not being litigated in the action, it is very apparent that the final judgment rendered, as far as she is concerned, is wholly void. Respondent, by its brief, declares: “The only point of difference between us is as to the effect of the final judgment, which, it must be conceded,

is in its terms broad enough to include the adverse title." The decree, upon its face, by its terms, being broad enough to include appellant's adverse title, was necessarily void to that extent, and she had the right to appeal from such void decree. It is said in *Merced Bank v. Rosenthal*, 99 Cal. 44: "Still, as in this case it would be in form a judgment entered in the records of the court upon which final process might be issued, which, although void, might through judicial machinery be made oppressive to individuals, it is therefore a grievance which may properly be remedied by a tribunal which exists for the correction of errors."

For the foregoing reasons the cause is remanded, with directions to the trial court to modify its judgment in accordance with the foregoing views.

Harrison, J., and Van Dyke, J., concurred.

[Sac. No. 813. Department Two.—November 22, 1901.]

J. D. GOODWIN et al., Respondents, v. JOHN R. PERKINS and MARY PERKINS, Appellants.

MINE UPON HOMESTEAD—IMPROVEMENTS UNDER ORAL CONTRACT—REFUSAL TO SIGN AGREED WRITING—RECOVERY OF IMPROVEMENTS—FINDINGS—CONFLICTING EVIDENCE.—Mining machinery and other improvements erected by the plaintiffs upon a mine situated upon the homestead of the defendants, under an oral contract therefor, and for possession and an interest in the mine, which it was agreed should be written and executed by the parties, but which, when drafted by the plaintiffs, and orally assented to as correct by the defendants, who agreed to sign it, they finally refused to sign, and thereupon ousted the plaintiffs, after the improvements were completed as agreed, may be recovered by the plaintiffs, under findings, upon substantially conflicting evidence of such facts alleged in the complaint, which showed that the plaintiffs, as tenants at will under the oral contract, were entitled to remove the improvements, and to have possession for that purpose, and that the improvements were not so constructed as to be an integral part of the mine, and could be removed without injury to the realty.

ID.—RECOVERY OF IMPROVEMENTS AS PERSONAL PROPERTY—POSSESSION—TENANCY AT WILL.—The machinery and other improvements,

under the facts of the case, may be recovered as personal property, upon demand therefor, and refusal to deliver the same without temporary possession of the premises, and without reference to any tenancy at will upon the homestead premises, which could be created only as provided by law, by a properly acknowledged instrument. [Per Temple, J., specially concurring.]

APPEAL from a judgment of the Superior Court of Lassen County and from an order denying a new trial. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

Spencer & Raker, and H. D. & G. S. Burroughs, for Appellants.

Goodwin & Goodwin, for Respondents.

McFARLAND, J.—This case involves the right of plaintiffs to certain mining machinery, including an engine and boiler, quartz-mill, battery, with buildings, tools, etc., placed by them on certain land of defendants. Judgment was for plaintiffs and defendants appealed.

The following facts are alleged by plaintiffs and found by the court: Defendants are husband and wife, and in August, 1895, were the owners of a tract of land which constituted their homestead. On a part of this land there was evidence of a gold-bearing quartz ledge upon which some work had been done, and which, with its appurtenances, was known as the "Lone Pine" mining property. In said month plaintiffs offered to the defendant J. R. Perkins to expend two thousand dollars in machinery, labor, etc., in developing said quartz ledge in accordance with a certain agreement then verbally made between them, which was to be put into the form of a written contract, and which, when written, Perkins promised that he and his wife would sign. The agreement which Perkins thus promised to sign when written was, briefly stated, that plaintiffs were to have possession of the mining premises for a certain period, with leave to work it, etc.; and if within the time specified they should put on the two thousand dollars' worth of improvements, and in addition should pay defendants one thousand dollars, then defendants were to convey to plaintiffs the undivided three fourths of said mining property. There were also some agreements about a division of gold which

might be taken out during the working period, etc., that are not necessary to be mentioned. Perkins requested plaintiffs to have the agreement reduced to writing, but by mutual agreement, in order to save delay, plaintiffs were to immediately take possession and commence work. With this understanding plaintiffs took possession and commenced work. A few days afterwards, a draft of the written contract was prepared by plaintiffs and submitted to Perkins, who suggested some amendments, which were agreed to by plaintiffs, who engrossed the contract as amended, and left the same with the defendants for their signatures. Defendants were both satisfied with the contract, and promised to sign it at their convenience, and thus induced plaintiffs to proceed with the improvements with the understanding that defendants would sign, but they failed and refused to do so, and never have signed the said contract. Afterwards, and while plaintiffs were in possession of the premises and improvements, defendants entered and ousted plaintiffs therefrom. The improvements were put on the premises for the purpose of conducting the business of mining, and were mining improvements. They were not so constructed or attached as to be an integral part of the mine or premises, and can be removed without any injury to the mine, land, or premises. The court below found that, under the circumstances, the plaintiffs were tenants at will, and had the right to remove said improvements, and to have possession for that purpose.

The main questions in the case are questions of fact, and if the findings of fact are justified by the evidence, the judgment is right. There was evidence on both sides of the issues of fact; but there was testimony directly sustaining all the findings, and while this testimony was sharply contradicted by other witnesses, it was for the trial court to determine the preponderance. We cannot say that the evidence was not fairly and materially "conflicting" within the established rule, and therefore we cannot here disturb these findings.

There are some exceptions to rulings made touching the admissibility of evidence, but none of such rulings are upon matters material to the decision of the case. There was some evidence introduced against appellants' objection to the point that a small part of the machinery put on the premises had been borrowed by plaintiffs from a third party,

but the decision was not upon the theory that any part of the improvements were borrowed, and the ruling was immaterial.

The judgment and order denying a new trial appealed from are affirmed.

Henshaw, J., concurred.

TEMPLE, J., concurring specially.—I concur in the judgment, but am not able to agree that the plaintiffs were tenants at will, as argued in the briefs. As the property constituted a homestead, a tenancy of any kind could be created only as provided by law, by an instrument in writing, signed and acknowledged by both husband and wife. If the plaintiffs had paid money to defendants upon a void contract for the purchase of land, they could, after demand, have maintained an action to recover the money. Here they furnish certain personal property upon such a contract, and I see no reason why they may not recover its possession after demand and refusal. The demand for temporary possession of the land is immaterial, and the action may be regarded as an ordinary suit for the recovery of personal property.

[L. A. No. 1041. Department Two.—November 22, 1901.]

In the Matter of the Estate of JUAN YTURBURRU, an Insane Person.

INSANE PERSON—LIABILITY FOR NECESSARIES AT STATE HOSPITAL—ORDER FOR PAYMENTS BY GUARDIAN.—An insane person is liable for the reasonable value of necessities furnished for his support at the state hospital, as required by the law of the state; and where his estate is sufficient for his support, an order may be made by the superior court requiring the guardian to make payments for his care and support at the state hospital.

ID.—CONSTITUTIONALITY OF STATUTE—GENERAL LAW—TAXATION—SUPPORT OF HOSPITAL.—The law requiring that patients at the hospital for the insane shall be there supported out of their own estate is wise and reasonable, and does not violate the constitution. The law is general, and is based upon a proper classification. It does not impose double taxation, or any taxation; and the money ordered paid goes to the support of the hospital, only because the patient is there supported.

APPEAL from an order of the Superior Court of Los Angeles County directing payment to the southern California state hospital, by the guardian of an insane ward. Lucien Shaw, Judge.

The facts are stated in the opinion.

H. H. Appel, and Walter J. Horgan, for Appellant.

Tirey L. Ford, Attorney-General, and George L. Hughes, for Respondent.

GRAY, C.—This is an appeal from an order of the superior court directing the guardian of the above-named insane person to pay certain amounts to the southern California state hospital for the care and support of his ward at that institution, where he is detained under a commitment as an insane person.

The only point urged by the guardian for a reversal of the order is to the effect that the law making the guardian of the estate of an insane person, where the latter's estate is sufficient, responsible for his maintenance at a state hospital for the insane is unconstitutional. But this contention cannot be upheld.

An insane person is liable for the reasonable value of things furnished to him, necessary for his support. (Civ. Code, sec. 38.) This was so at common law, where the necessities were furnished by an individual, and we have never seen a case, and do not think any can be found, holding that this rule comes in conflict with any provision of the constitution of this state or of any other state of the Union. We see no reason why the same rule should not apply to a state hospital for the insane, which does and furnishes for the insane person only those things required by the law of the state. Certainly, those things which are required by law to be done and furnished for an insane person may safely be classed as necessities.

The contention of appellant based on the theory that these hospitals are charitable and eleemosynary institutions, and should not be converted into boarding-houses, finds a ready answer. It is as necessary to have institutions for the restraint of the insane, whether they be rich or poor, as it is to have prisons and almshouses; and these institutions for the insane are charitable only so far as the legislature makes them so. There is nothing in the constitution inhibiting laws extending charity to people in need of it; but it

is not necessary to extend charity to those who are able to support themselves; indeed, it would be unreasonable to do so.

A law in effect requiring that patients at the hospitals for the insane shall be there supported out of their own estates is wise and reasonable, and does not come within any inhibition of the constitution against class legislation. The law, on the contrary, is general in its application, and recognizes no classification except such as in the very nature of things necessarily exists, and cannot be disregarded. We presume that every state in the Union has its "poor laws," under which the poor and needy, whether they are decrepit, sick, or insane, find protection and support. Of course, those having means for their own support are not admitted to the benefits of these laws. The distinction between the helpless and those able to help themselves is a natural one, and, so far as we are informed, pervades the laws of all civilized countries.

It is not double taxation, nor taxation at all, to require a man to be supported out of his own estate. The money ordered paid herein is for the maintenance of the patient. It goes to the support of the hospital, only because of the presence of the patient therein.

As supporting the foregoing views we cite *McNairy County v. McCoin*, 101 Tenn. 74; *Simons v. Van Benthuyssen*, 121 Mich. 697; *Goodale v. Lawrence*, 88 N. Y. 513,¹ and cases therein cited; *Watt v. Smith*, 89 Cal. 602. In the last case it was held that a husband was liable for the support of his indigent wife while an inmate of the insane asylum; and on the same principle the inmate's estate would be liable. The cases cited by appellant holding to a contrary view as to the liability of the husband are in conflict with the California case cited, and are not to be regarded as authority in this state.

We advise that the order be affirmed.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

Henshaw, J., McFarland, J.

TEMPLE, J., concurring.—I concur. The appellant seems to think that since he was forcibly and against his will

¹ 42 Am. Rep. 259.

deprived of his liberty and confined in a state institution, the law will not imply a promise on his part to pay for such maintenance. Nor has he been convicted of any offense which might authorize the collection of the sum as costs, by way of a penalty. It is averred that he has an estate, and under such circumstances the law provides for a guardian, if he is incompetent, who shall provide for him proper care, with such degree of freedom as is compatible with his condition. Under such circumstances, it is argued, he cannot be imprisoned and deprived of such medical aid as his guardian and friends could furnish, and then be made to pay for the restraint.

But the insane have always been regarded as subject to control on the part of the state, both for their protection and for the protection of others. When the state finds it necessary to keep them in its hospitals, I see no reason why a charge may not be made for their support. If they have a right to free support because paupers have, to make the law operate alike upon all, it would seem that the balance of the community would be equally entitled.

[S. F. No. 1809. In Bank.—November 23, 1901.]

MARY E. FITZHUGH, Respondent, v. VERONICA C. BAIRD, Appellant.

LEASE OF HOUSE NOT OCCUPIED BY TENANT—ACTION FOR RENT—ISSUE AS TO CONTRACT OF HIRING—CONFLICTING EVIDENCE—SUPPORT OF FINDINGS.—In an action for rent upon a lease of a house for six months, where the defendant did not occupy the house leased, and the only issue presented by the pleadings was, whether the defendant had hired the premises leased, and the evidence was highly conflicting upon that issue, the findings in favor of the plaintiff will not be disturbed upon appeal. [Held, *contra*, by Beatty, C. J., and Temple, J., dissenting, that upon certain undisputed facts testified to, the plaintiff was not entitled to recover.]

ID.—POSSESSION BY LESSOR—RECOUPMENT NOT PLEADED—EVIDENCE.—Where the defendant pleaded no recoupment on account of the lessor's possession of the leased premises, and did not offer evidence to show that the possession was of any value to the lessor, and the lessor testified to the effect that the occupancy taken was to protect the house and its contents from injury in case it should remain vacant, such possession cannot affect the liability of the lessee for the rent.

ID.—ADVICE OF PHYSICIAN TO LESSEE—CROSS-EXAMINATION—PRIVILEGE

—Upon proper cross-examination of the defendant lessee, the advice of a physician as to moving into the house may be proved, if not shown to be in any respect privileged.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Edward C. Belcher, Judge.

The main facts are stated in the opinion of the court. Further facts are stated in the opinion of Beatty, C. J.

Knight & Heggerty, and William M. Madden, for Appellant.

Reel B. Terry, and Rodgers, Paterson & Slack, for Respondent.

THE COURT.—The complaint alleges that the plaintiff rented and the defendant hired from her a certain dwelling-house, 2519 Broadway, San Francisco, "for the term of six months, commencing January 15, 1896, . . . for the rental of six hundred dollars, in six equal installments of one hundred dollars each, in advance, on the fifteenth day of each and every month." The defendant denied the allegations of the complaint, and avers that the plaintiff never rented to her any house, and that she never hired any house from the plaintiff. The cause was tried by the court sitting without a jury, and the court found the facts substantially as alleged in the complaint, and gave plaintiff judgment for six hundred dollars and interest. Defendant appeals from the judgment and from the order denying her motion for a new trial.

The only issue presented for the decision of the court was, whether the defendant had hired the premises from the plaintiff, as alleged in the complaint. Upon this issue, testimony was given on behalf of the respective parties concerning the negotiations between them in regard to such hiring, and the court determined therefrom in accordance with the claim of the plaintiff. This testimony was highly conflicting, and the decision of the trial court must be accepted as correct.

The proposition of the appellant that she is not liable to the plaintiff for the full amount of the rent agreed upon, inasmuch as the plaintiff was not deprived of the possession of the premises, and did in fact occupy them a portion of the time, is untenable. There was no issue of this nature

before the court, the only issue being whether the defendant had made a contract with the plaintiff for the term and at the rent named in the complaint. The defendant did not set up in her answer any claim for recoupment of the plaintiff's demand, nor was any evidence presented at the trial that the occupancy of the premises by the plaintiff for a portion of the time had been of any value to her. The testimony of the plaintiff was to the effect that her occupancy of the house was for the purpose of protecting it and its contents from injury or loss in case it should have remained vacant, thus relieving the defendant of an obligation which rested upon her by virtue of her contract.

No error was committed in overruling the objection to the question asked of the appellant concerning the advice of her physician about moving into the house. The question was proper cross-examination, and it was not shown to be in any respect privileged.

The judgment and order are affirmed.

BEATTY, C. J., dissenting.—I dissent. It is true that there is a conflict of evidence as to whether the terms of a lease were finally settled by an oral agreement between the plaintiff and defendant. But there is no conflict of evidence as to other facts of controlling force. The plaintiff herself testifies: "I left the matter entirely in charge of my husband. He attended to it for me." Armed with this authority, and acting in her behalf, plaintiff's husband caused a written lease to be prepared and presented to defendant for her signature, containing important stipulations and onerous conditions which had never been mentioned in any of the oral negotiations between plaintiff and defendant. The defendant was not then in possession of the house, and had a perfect right to assume, as she did assume, that the written lease contained the conditions upon which alone she would be permitted to take possession, and whether or not a valid oral lease had been previously concluded by plaintiff herself, this demand made by her authorized agent was a repudiation of it, upon which the defendant had a right to act, as she did, in declining to proceed further.

The plaintiff cannot, after authorizing her husband to attend to the matter for her, evade responsibility for his acts.

The judgment and order are, in my opinion, clearly erroneous, and should be reversed.

TEMPLE, J., concurring in dissent.—I concur in the dissenting opinion, and further think the undisputed facts show that plaintiff had no right of action for rents at all. It was her duty, after she took possession, when the defendant refused to take the property, to do the best she could with it, and she could only recover the difference between what she was able to get out of it, and the agreed rent. This is, of course, upon the supposition that there was a valid demise which defendant had no right to treat as rescinded.

[S. F. No. 2782. Department One.—November 23, 1901.]

MARIA F. ROWE, Executrix, Appellant, v. WILLIAM T. SUCH et al., Respondents.

ACTION FOR DEATH—RUNAWAY HORSE—BURDEN OF PROOF—NEGLIGENCE NOT PRESUMED—NONSUIT.—In an action by an executrix to recover for the death of the testator, caused from being struck by a wagon drawn by a runaway horse, the burden of proof is upon the plaintiff to show the negligence of the driver. In the absence of such proof, there is no presumption of negligence arising from the fact that the horse ran away; and the burden is not thereby cast upon the owner of the team, sued as defendant, to explain how or why the runaway occurred; but the defendant is entitled to a nonsuit.

ID.—EVIDENCE—VERDICT OF CORONER'S JURY NOT ADMISSIBLE—HEARSAY.—The verdict of the coroner's jury is not admissible to prove that the death of the plaintiff's testator was caused by the negligence of the defendant. The verdict could not bind the defendant, who was not a party to it, and upon the question of negligence the opinion of the coroner's jury was inadmissible hearsay.

ID.—EXPERT EVIDENCE—COMPETENCY AND SKILLFULNESS OF DRIVER—HYPOTHETICAL QUESTION—PROPER EXCLUSION.—The competency and skillfulness of the driver of the wagon was not a proper subject for expert evidence; and where the only issue related to the negligence of the driver, a hypothetical question addressed to a witness, calling for his opinion as to the competency and skillfulness of the driver, which assumed facts not alleged or proved, was properly excluded.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellant.

Welles Whitmore, C. H. Wilson, and W. W. Watson, for Respondents.

THE COURT.—Plaintiff's testate was killed on Van Ness Avenue, San Francisco, having been struck by a wagon drawn by a runaway horse belonging to defendant Nelson, and this action was to recover damages for the death. At the close of the evidence for plaintiff, the court granted a motion for non-suit. The appeal is from the judgment and from the order denying plaintiff's motion for a new trial.

The driver of the horse was not called by plaintiff as a witness, and there was no evidence as to what caused the horse to run away. The witnesses Taggard and Wilson testified that their attention was attracted by some one crying "Whoa, whoa," and on looking in the direction of the cry they saw the wagon coming. Witness Taggard testified: "The driver was in the air, and he sat down on the ground, and the horse ran away, and the man jumped up and ran after him. The horse was going towards Van Ness Avenue, and the driver fell off, or got off, about right opposite the door of the armory on Ellis Street." This witness further testified: "The driver was in the air when I saw him, between the seat and the ground. He was off the seat. . . . The horse was not going very fast then. The driver ran after the horse. The horse then ran; by that time the reins were dangling around the horse's feet. The horse then ran so fast that I did not want to try to stop him." The horse went up Willow Avenue to Van Ness Avenue, where he turned down towards Market Street. He ran into a crowd of men who were working on Van Ness Avenue, and collided with deceased, who was so severely hurt that he died shortly after receiving the injury. It is conceded that there was no contributory negligence on the part of deceased.

Appellant contends that she made out a *prima facie* case against the defendant Nelson, under whose management and control the horse had been driven by his driver, Baumert, prior to the accident. Numerous cases are cited in support of the rule laid down in *Judson v. Giant Powder Co.*, 107 Cal. 556, namely: "When a thing which causes the injury is shown to be under the management of the defendant, and

the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In short, it is here contended that the presumption of negligence arose from the fact that the horse ran away, and that the burden is therefore cast upon the owner to explain how or why it happened. The rule of law here invoked cannot be applied to the state of facts disclosed by the foregoing evidence. The following cases fully support the ruling of the trial court: *Button v. Frink*, 51 Conn. 342;¹ *Quinlan v. Sixth Avenue R. R. Co.*, 4 Daly, 487; *Gollwald v. Bernheimer*, 6 Daly, 212; *Gray v. Tompkins*, 15 N. Y. Supp. 953; *Cadwell v. Arnheim*, 152 N. Y. 182; *Brown v. Collins*, 53 N. H. 442;² *Bennett v. Ford*, 47 Ind. 264; *O'Brien v. Miller*, 60 Conn. 214;³ *Creamer v. McIlvain*, 89 Md. 343;⁴ *Herrick v. Sullivan*, 120 Mass. 576; *Miller v. Cohen*, 173 Pa. St. 488; *Holmes v. Mather*, L. R. 10 Ex. 261.

Appellant concedes that in the case at bar the horse ran away because of some unexplained cause. There is absolutely no evidence pointing to negligence on the part of the driver. When he was first seen he was "in the air," and falling from his seat to the ground. Whether he lost control of his horse through negligence is not shown, nor does any fact appear from which negligence could be inferred. Whatever caused the runaway is matter of speculation, pure and simple, and it is as fair to presume that the cause was unavoidable as that it was the fault of the driver. The burden was on plaintiff to show negligence of the driver, failing in which it became the duty of the trial judge to take the case from the jury. It is said in *Button v. Frink*, the Connecticut case cited: "If a horse is running away with his driver, there is nothing in the fact itself which tends to show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise, and it would seem that it could as well be inferred, in such a case, that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is run-

¹ 50 Am. Rep. 24.

² 16 Am. Rep. 372.

³ 25 Am. St. Rep. 320.

⁴ 73 Am. St. Rep. 186.

ning away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might not be carried." And again: "A man driving furiously along the street runs into my carriage and breaks it. Here the act indicates negligence on the part of the driver. Again, the defendant's horse is running furiously along the street, dragging the shafts of a carriage after him, and runs against and breaks my carriage. This indicates accident only, and not negligence."

The verdict of the coroner's jury was offered in evidence by plaintiff, and on objection of defendants was excluded, and this is urged as error.

Appellant claims that the coroner acts in a judicial capacity, and that the verdict of the jury is *prima facie* evidence of the cause of death. It was admitted that the deceased died from the injury, and the only purpose of the offer, therefore, was to prove negligence. Upon the question of negligence the opinion of the jury was but hearsay. (*Hollister v. Cordero*, 76 Cal. 649.) Viewed as a judicial proceeding, the inquest could not bind defendant, who was not a party to it. The question was considered in the following cases, and the proceedings at the inquest excluded: *State v. County Commissioners*, 54 Md. 426; *Germania Life Ins. Co. v. Ross-Lewin*, 24 Col. 43;¹ *Louis v. Connecticut Life Ins. Co.*, 58 App. Div. 137; 68 N. Y. Supp. 683; *Pittsburg etc. Ry. Co. v. McGrath*, 115 Ill. 172; *Memphis etc. R. R. Co. v. Womack*, 84 Ala. 149; *The Central R. R. v. Moore*, 61 Ga. 151.

Plaintiff called as a witness one Martin, and asked him the following question: "I will ask you a hypothetical question. What would you say if the driver of the wagon going up a grade, or on an even street, in the daytime, the horse in an ordinary jog, would lose control of his horse, and be precipitated to the ground—what would you say as to the competency or skillfulness of such a driver?" Defendants objected on the ground that the question was irrelevant and immaterial, that no foundation had been laid, and that it assumed facts not in evidence. The court rightly sustained the objection. Hypothetical questions, where allowable at all, must conform to facts proven, which this question failed to do. Furthermore, the pleadings did not put in issue the general skillfulness of the driver; the issue

¹ 65 Am. St. Rep. 215.

raised was as to his negligent management of the horse, which did not necessarily depend upon the general fitness of the driver. The complaint alleged only that the driver was negligent and careless, and mismanaged his horse, and hence the accident. Besides, it was not a case where expert testimony, such as was sought to be elicited, was admissible to prove the competency or incompetency of the driver.

The judgment and order are affirmed.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 24th of December, 1901:—

BEATTY, C. J.—I dissent from the order denying a rehearing. The proposition discussed in the opinion of the Department, and upon which the case is decided, is not the proposition upon which a correct decision depends.

It is true that the appellant does quote and claim the application of the rule thoroughly established by several recent decisions of this court, that “when a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care.” But she does not contend, and her case does not require her to maintain, that a legal presumption of negligence arose from the mere fact that the horse ran away, requiring the court to instruct the jury that upon proof of that fact alone they must, in the absence of explanation by the defendant, find a verdict in her favor. No question as to the shifting of the burden of proof was or could be involved in the case. The plaintiff had been nonsuited by the trial court, and all that was necessary for her to do in order to reverse that order was to show that she had introduced evidence sufficient to make out a *prima facie* case for the jury—a case, that is to say, from which negligence might be inferred as matter of fact, as contradistinguished from a presumption of law.

In view of this distinction, the long list of cases cited in CXXXIV. CAL.—37

the Department opinion falls very far short of sustaining the ruling of the trial court. Take the first case cited. (*Button v. Frink*, 51 Conn. 342.) There, the defendant's horse ran away in consequence of a broken bridle, causing a collision, in which plaintiff was injured. Upon this evidence the trial judge instructed the jury, in effect, "that in the absence of explanatory testimony by the defendant, showing that he was guilty of no negligence, negligence might be inferred against him as matter of law." On appeal, this was held to be error, upon the ground, expressly stated in the opinion, that the court could not instruct the jury, *as matter of law*, that such evidence was sufficient to make out a *prima facie* case of negligence, and to shift the burden of proof to the defendant to explain or excuse it. But they did not decide that on such a case the court could properly grant a nonsuit. On the contrary, they took pains to distinguish the cases in which, upon a similar state of the evidence, nonsuits had been refused, and point out, what is sufficiently apparent, that on a motion for a nonsuit the court can only consider what the evidence tends to prove as matter of fact, and if it is *prima facie* sufficient, leave it to the jury to determine the fact—while in giving the instruction there in question the court had usurped the province of the jury in holding that evidence from which a jury might or might not infer negligence as a fact established a legal presumption of negligence. So far from holding that the fact of the runaway and collision is no evidence of negligence, the court, in its opinion, uses this plain and unequivocal language: "Now, in suits brought for damages done in these cases, if the plaintiff should prove only the fact of the collision, and the defendant should offer no evidence whatever, the court ought to *charge the jury* that the burden of proof is not in either case thrown upon the defendant *as matter of law*, but that the plaintiff is to recover or not, according as they shall, in the exercise of their judgment, consider the acts as in themselves indicating or not indicating negligence on the part of the respondent. The failure of the defendant to offer any explanatory evidence may operate to *strengthen the plaintiff's case*, but it must always be in a case where the act done carries, in itself, an indication of negligence, or in other words, creates a presumption of fact, not of law, that the defendant had been guilty of negligence."

The italics in the above quotation are mine, and are intended to call attention to the distinction constantly insisted

upon throughout the opinion, between the question of fact involved in the motion for a nonsuit and the unwarranted presumption of law stated in the instruction. Note, also, that upon mere proof of the collision the plaintiff has made a case for the jury which may be strengthened by the failure of the defendant to offer explanatory evidence. Still another thing to be noted in this opinion for its bearing on the present case is the distinction made between the case of a horse running away without a driver, and the cases in which the driver is holding the reins and exerting all his power to check the team. In the latter case it is said that there is nothing in the mere fact of the runaway tending to prove negligence, but there is no question of the authority of those cases in which it has been held that horses running in a public street without a driver is, of itself, evidence of negligence requiring explanation. Several cases holding this doctrine are cited in appellant's brief, and I know of none to the contrary. A single citation will suffice to show the solid basis upon which the doctrine rests: "The fact itself that a team is found running away upon the streets of a city, without a driver, requires explanation as to how and why this should have been, and if the driver is not produced as a witness, or his absence accounted for, it is fair to presume that no satisfactory explanation could have been given." (*Maus v. Broderick*, 51-La. Ann. 1153.)

In this case the horse ran away without a driver. The evidence shows that he left the wagon, losing the control of reins and brake before the horse started to run. How he came to leave the wagon, no one knows. He was heard to cry out, "Whoa, whoa," and the witnesses, on turning to look, saw him in the air, between his seat and the pavement. He "sat" on the ground, but immediately got up and ran after the horse, which then for the first time started to run. There is nothing in this evidence to warrant an inference that the driver was thrown from the wagon by reason of some accident. There is no suggestion of an accident, and a sober driver is not likely to be thrown from a slowly moving wagon on one of the city streets. I should infer, on the contrary, and certainly a jury would have been warranted in assuming, in the absence of any explanation, that the driver had dropped the reins and jumped to the ground for the purpose of recovering them.

The case, in my opinion, was clearly one for the jury.

[S. F. No. 2561. Department Two.—November 25, 1901.]

JOHN A. DRINKHOUSE, Administrator of Estate of Hattie A. Trundle, Deceased, Appellant, v. EMMA L. MERRITT and W. R. H. ADAMSON, Executors of Will of Adolph Sutro, Deceased, Respondents.

ESTATES OF DECEASED PERSONS—ACTION UPON CLAIM—TORT OF TESTATOR AGAINST INTESTATE—AGREED PROVISION IN WILL—SATISFACTION—PRIOR DEATH OF INTESTATE.—Where a wrong done by a deceased testator against a deceased intestate was settled by an agreement between them that the former should make provision in his last will in satisfaction thereof, and the agreement was fully performed in the last will of the testator, the claim for the tort was thus extinguished; and the fact that the person wronged died intestate before the death of the testator cannot justify the presentation of a claim by the administrator of the deceased intestate against the estate of the deceased testator, or support an action upon such claim.

ID.—REMEDY UNDER WILL IN PROBATE JURISDICTION.—If the estate of the deceased intestate has any interest in the estate of the deceased testator, it exists by virtue of the will of the latter, and is the appropriate subject of probate jurisdiction in the administration and distribution of that estate; and the sole remedy of the administrator of the intestate is to be sought in that jurisdiction, under the will of the testator.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

A. Ruef, E. A. Holman, Welles Whitmore, and E. B. Mering, for Appellant.

Lloyd & Wood, and McKinstry, Bradley & McKinstry, for Emma L. Merritt, Respondent.

Campbell, Metson & Campbell, for W. R. H. Adamson, Respondent.

THE COURT.—This action is based upon a claim against the estate of Adolph Sutro for fifty thousand dollars, presented by plaintiff to defendants and by them rejected. The demurrer to the complaint was sustained on the ground of

"lack of jurisdiction," and without leave to amend. The defendants had judgment, from which plaintiff appeals.

The essential facts as set out in the complaint are as follows: "That in the month of July, 1879, at Virginia City, in the state of Nevada, said Adolph Sutro and Leah Sutro, his wife, in the presence of each other, committed a wanton, unprovoked, violent, and malicious personal assault and battery on said Hattie A. Trundle, and then and there, with malice, used, spoke, and published of and concerning and toward said Hattie A. Trundle certain false, scandalous, and malicious language in the presence and hearing of third parties, all of which caused great public scandal concerning said Hattie A. Trundle, deceased; that said Hattie A. Trundle thereafter intended, and announced her intention to said Adolph Sutro to commence legal actions for damages against said Adolph Sutro therefor, but at the request of said Adolph Sutro did not do so, and refrained from so doing, and waived her legal rights in the premises in that regard, on the express promise made and contract and agreement of said Adolph Sutro, entered into with said Hattie A. Trundle, that he would make reparation and compensation for said wrongs by the provision hereafter mentioned in his will, for said Hattie A. Trundle; that in reliance on said promise, agreement, and contract, and in consideration thereof, said Hattie A. Trundle refrained from any legal proceedings whatever in the premises, and accepted the same and said provision to be made in the will of said Adolph Sutro in satisfaction thereof; that under and in accordance with said promise, agreement, and contract, said Adolph Sutro made and executed on the twenty-second day of May, 1882, his last will and testament, which will and testament . . . has been duly proven and admitted to probate in the matter of the estate of Adolph Sutro, deceased; . . . that said will, in so far as it concerns said agreement with said Hattie A. Trundle, was and is in the words and figures following, to wit: 'I, Adolph Sutro, do hereby make, publish, and declare the following as and to be my last will and testament. I give, devise, and bequeath to the parties, purposes, and objects hereinafter named and specified as follows, to wit: . . . Eighteenth. Unto Miss Hattie Trundle, of Washington, District of Columbia, heretofore known as Mrs. George Allen, the sum of fifty thousand dollars (\$50,000), as a reparation, as far as may be possible, for the injury done her

by a scandalous charge falsely and maliciously at Virginia City, state of Nevada, in the month of July, 1879, then and there brought against her.' That said provision was made for a valuable consideration then existing, to wit, for the said waiver of the said legal rights of said Hattie A. Trundle, which were then existing, as under the laws of the state of Nevada said rights did not outlaw until the expiration of two years, exclusive of the time of non-residence of a defendant; that said Adolph Sutro was in said state of Nevada for less than a year between July, 1879, and May 22, 1882."

The complaint also sets forth facts showing that Hattie A. Trundle died intestate, previous to the decease of Sutro.

We think the demurrer to the complaint was properly sustained.

The agreement of Sutro, "that he would make reparation and compensation for said wrongs by the provision hereinafter mentioned in his will," was complied with and fully performed on the part of Sutro when he left at his death a will to the effect agreed upon; and such performance on his part extinguished whatever obligation previously existed, and left nothing upon which to base a contract claim, or which required the presentation of a claim against the estate. "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it." (Civ. Code, sec. 1473.) It is expressly alleged in the complaint that plaintiff's intestate accepted the "provision to be made in said will" in satisfaction of her claim. We conclude that if plaintiff has any interest at all in the estate of Sutro it exists by virtue of the will, and is the appropriate subject of the jurisdiction of the probate court in the administration and distribution of that estate, and that a suit cannot be maintained upon an obligation that has been extinguished.

It is not necessary for us here to discuss the subject of lapsed legacies, for that must be left to the jurisdiction, in the first instance, of the proper tribunal, to wit, the probate court, and anything we might say here as to that would be only *obiter*.

The judgment is affirmed.

[Sac. No. 830. Department Two.—November 25, 1901.]

TUOLUMNE CONSOLIDATED MINING COMPANY,
Appellant, v. **A. C. MAIER,** Respondent.

MINING CLAIMS—WATER RIGHTS—DITCH—PRIOR APPROPRIATION—INJUNCTION—FINDINGS AGAINST EVIDENCE.—In an action by the owner of a mining claim to enjoin interference with the plaintiff's ditch, which conveyed water for mining purposes across defendant's claim, findings in favor of the defendant, under his cross-complaint seeking an injunction against the plaintiff, to the effect that he had made a prior location of the water right and of his quartz mine, are against evidence which shows the initiation of a prior right to the water and ditch in the plaintiff, and does not show any notice of appropriation of the water by the defendant, but shows that the defendant's first use of the water was subsequent in point of time to plaintiff's appropriation thereof, and does not show that the defendant had discovered any minerals within his quartz location until after plaintiff's right to maintain his ditch had attached.

ID.—LOCATION OF MINING CLAIM—DISCOVERY OF MINERAL.—There can be no valid location of a mining claim without an actual discovery of mineral thereon; and conceding that a previous location without such discovery may become valid by a subsequent discovery of mineral, the land must be treated as government land up to the time of such discovery. A location based upon a discovery within the limits of another existing and valid location is void.

APPEAL from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

J. P. O'Brien, for Appellant.

F. W. Street, for Respondent.

THE COURT.—Action for an injunction against the interference of defendant with plaintiff's ditch. The defendant filed a cross-complaint, alleging that he was the owner of the Buena Vista Quartz Mine, situated below the head of plaintiff's ditch on Duckwall Creek, and that plaintiff, by means of its ditch, had deprived defendant of the use of the water of said creek in and upon his said quartz-mining claim; also, that plaintiff had constructed its said ditch across defendant's said mine. The court gave defendant judgment for restitution of that portion of his mining claim across which the ditch was constructed, and perpetually enjoining

plaintiff from diverting the waters from said creek, and from in any manner preventing at least twenty inches of the natural waters thereof from flowing in their natural channel over and through said Buena Vista Quartz Mine.

The appeal before us is from an order denying plaintiff's motion for a new trial.

It appears that the plaintiff, a mining corporation, owned the Providence Mine, and in connection therewith it owned the ditch running across defendant's said Buena Vista mining claim; that the construction of this ditch, and the accompanying appropriation of water, was initiated on the twelfth day of June, 1897, by duly posting and recording a notice of appropriation of five hundred inches of the waters of said Duckwall Creek for use on said Providence Mine; that thereafter the construction of the ditch proceeded with due diligence to the time of its completion in October, 1898.

Prior to the initiation of the construction of this ditch, and on the tenth day of February, 1896, the defendant located the said Buena Vista Quartz Mine. It appears that the last-named mine, as located, overlapped to a large extent a previously located claim, known as the Cornet Mine. Duckwall Creek runs through that part of the Buena Vista which does not overlap any other claim. In 1898, the defendant constructed a dam in Duckwall Creek, and in the month of December of that year he commenced for the first time to divert and use the waters of said creek for mining and milling purposes. The court found, in effect, that the defendant, with others, duly located the Buena Vista Mine on the tenth day of February, 1896, and that the defendant ever since that date had been the owner of an interest therein.

The court further found that ever since said last-mentioned date, and until prevented by plaintiff from so doing, the defendant used the waters of said creek, to the extent of twenty inches thereof, "in and upon said Buena Vista Quartz Mine, for mining and milling purposes."

The appellant attacks both these findings, on the ground that they are not supported by the evidence, and we think the ground is well taken.

As to the latter finding, there was no evidence of the posting of any notice of appropriation, and the testimony of respondent as a witness is to the effect that his first use of

the water for mining purposes was not earlier than December, 1898, when he first used it in his mill. There was no evidence of any earlier use than this of said water for mining or milling purposes by defendant. So far as the appropriation of the waters of said creek are concerned, the evidence without conflict shows plaintiff's appropriation to have been prior in point of time to defendant's.

As to the other finding, we think the evidence fails to show that the Buena Vista Mine was "duly located," as against plaintiff's right to maintain his ditch, for the reason that there is no evidence of any discovery of minerals until after plaintiff's right to maintain his ditch thereon had attached. We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon (*Erhardt v. Boaro*, 113 U. S. 535; *O'Reilly v. Campbell*, 116 U. S. 418); and for the purposes of this case it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may be here conceded that a previous location may be made valid by a subsequent discovery of mineral; still there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery. Of course, to be effective, the discovery must have been made outside the limits of the Cornet Mine. "A location based upon a discovery made within the limits of another existing and valid location is void." (Lindley on Mines, sec. 337; *Gwilim v. Donnellan*, 115 U. S. 45; *Upton v. Larkin*, 5 Mont. 600.) The evidence shows that the Cornet Mine came down to the north bank of said Duckwall Creek. We have searched respondent's testimony in vain to find where he testifies that he ever made any mineral discovery south of this creek or outside of the Cornet Mine. He says in his testimony: "I prospected the ground some, prior to making the location. I discovered quartz veins in and upon the ground. I prospected these veins to know if they carried gold." Where he did this prospecting, whether it was on the Cornet Mine or not, does not appear; nor does the result of his prospecting appear. Though he prospected for gold, he fails to tell us that he found a color. He should have discovered a mineral-bearing vein or lode, to make his claim valid. (U. S. Rev. Stats., sec. 2320.) The testimony of the other witnesses cited in respondent's brief is not available on the question of discovery, because it relates to a time subsequent to the construction of appellant's ditch. Some six or seven miners who had

examined the Buena Vista testified that there was no vein or lode on it; that they had examined the points where the vein or lode was said to be, and there was no vein there. There was, then, a sharp conflict in the evidence as to whether the alleged mine actually contained a vein or lode at the time of the trial or at all; but on the question of a mineral discovery there was an entire absence of evidence showing such discovery at any time previous to the construction of appellant's ditch. Treating the land, then, as government land at the time of the construction across it of appellant's ditch, whatever right may have been acquired in it by subsequent discoveries of mineral was subject to the easement of plaintiff's ditch, and to his rights as a prior appropriator. (*Smith v. Hawkins*, 110 Cal. 125; *Broder v. Water Co.*, 101 U. S. 275.) The findings referred to are without support in the evidence, and the order appealed from is therefore reversed.

Hearing in Bank denied.

[S. F. No. 1766. In Bank.—November 27, 1901.]

MILLER & LUX, Respondent, v. KERN COUNTY LAND
COMPANY, Appellant.

ACTION BETWEEN CORPORATIONS—INJURY TO LAND—PRINCIPAL PLACE OF BUSINESS—VENUE—CHANGE OF PLACE OF TRIAL.—In an action brought in the city and county of San Francisco, between corporations, each of which has its principal place of business therein, to recover damages for injury to real property situated in Kern County, the defendant is not entitled to demand, as matter of right, to have the cause tried in that county, under section 392 of the Code of Civil Procedure, without any showing of grounds "to change the place of trial, as in other cases," as contemplated by section 16 of article XII of the constitution.

Id.—CONSTRUCTION OF CONSTITUTION.—Section 16 of article XII of the constitution, which provides for the venue of actions against corporations, and permits the action, at the election of the plaintiff, to be prosecuted "in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases," is self-executing, and applies to actions of tort, as well as those founded in contract.

Though it is in the nature of a code provision for procedure, it cannot be repealed or limited in its operation by statute, and any statute inconsistent therewith must give way.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to change the place of trial of an action. Edward A. Belcher, Judge.

The facts are stated in the opinion of the court.

Page, McCutcheon & Eells, for Appellant.

Houghton & Houghton, E. B. & George H. Mastick, and Frohman & Jacobs, for Respondent.

TEMPLE, J.—This action is between two corporations, each of which has its principal place of business at San Francisco, to recover damages for alleged injury to real property in Kern County. At the proper time the defendant demanded a change of the place of trial to Kern County, showing, to obtain the order, only the fact that the property alleged to have been injured is in that county. This appeal is from an adverse ruling.

Appellant bases its contention on section 392 of the Code of Civil Procedure, which provides that actions for injuries to real property must be tried in the county where the subject of the action, or some part of it, is situated. The respondent relies upon section 16 of article XII of the constitution, which reads: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases."

This section is of the nature of a code provision in regard to procedure, and is obviously self-executing, and differs from a statutory code provision only in that it cannot be repealed, nor can its scope and operation be limited by a statute. So far as it conflicts with a statute, the statute must give way.

Apparently, section 16 of article XII of the constitution does provide, as to actions against corporations, that suit may be brought, at the option of the plaintiff, in counties which may not be the county in which the land alleged to have been injured is situated. The section applies to actions of

tort, as well as to those founded upon contract. It was expressly so held in *Lewis v. Southern Pacific R. R. Co.*, 66 Cal. 209, which decision has been repeatedly affirmed. It is quite obvious, also, from the language used in the section. The clauses of the section are disjunctively connected, and, in effect, refer to actions upon contract, or to actions to enforce an obligation or liability. Obligation is defined in sections 1427 and 1428 of the Civil Code. The law imposes upon one who has injured another the duty of making reparation, and upon this obligation the action for damages is based. (Pomeroy's Code Pleadings, secs. 453 et seq.) The word "liability," has always been held to apply to responsibility for torts, as well as for breach of contracts. (*Wood v. Currey*, 57 Cal. 208.) No reason is shown why an action upon a liability arising from a tort to real estate should be distinguished, in reference to this section, from actions upon other obligations or liabilities.

Great reliance seems to be placed by appellant upon the case of *Fresno National Bank v. Superior Court*, 83 Cal. 491, but I find nothing there favorable to appellant. That was an action upon contract, which was made and was to be performed in Fresno County, where the defendant corporation has its principal place of business. The action was brought in San Joaquin County, which was not a county indicated in section 16 of article XII of the constitution as a county in which suit may be brought for a breach of that contract. The defendant corporation asked for a dismissal of the action, on the ground that the superior court of San Joaquin County had no jurisdiction. This contention was based upon the idea that "may," in the section, means "must," and therefore no other counties except those named had jurisdiction. The decision was made upon denying a writ of prohibition. The ruling was, that section 16 of article XII was merely permissive. A plaintiff in such action may bring his action in either of the counties indicated, but if *he* does not choose to bring his action in either of said counties, but brings it another, the constitutional privilege has no application, and section 5 of article VI of the constitution governs. Under that, the court had jurisdiction of the subject-matter of the action. Therefore the writ was denied. If the constitutional rule of procedure is not mandatory, and the decision has never been questioned, the conclusion must follow, but it is not perceived how that conclusion affects any question involved here. In the argument the learned Com-

missioner referred to two cases for the condemnation of land, in which a change of venue to the principal place of business of the corporation was denied, and of these decisions he says in each case the denial was because section 1243 of the Code of Civil Procedure required such a proceeding to be instituted in the county where the land is situated, and since the proceeding is founded neither upon contract nor upon tort, he thought, if section 16 of article XII is mandatory, the plaintiff had an absolute right to a change. The section was not involved in these cases. Being founded neither upon contract nor upon tort, the proceeding was clearly not within section 16 of article XII. The condemnation proceedings were not brought against a corporation, and were not founded upon a breach of a contract, nor to enforce an obligation or a liability. They are not provided for in the constitution, and there was nothing to prevent the full operation of section 1243 of the code. In neither of the cases was the constitutional provision alluded to. The question was as to the effect of sections 396 and 1243 of the Code of Civil Procedure. But whether this was a mistaken citation or not, there is nothing said which can aid the appellant.

That the constitutional provision is a privilege, given to a plaintiff in actions against corporations, which he may waive, and that in case of such waiver the statutory provision will control, was held in *Griffin & S. Co. v. Magnolia etc. Co.*, 107 Cal. 378; also, that it is a mere rule of procedure, to be construed with other like provisions, only differing in that the legislature cannot repeal or modify it.

A change of venue could, of course, have been granted, although the plaintiff had brought his suit in a county designated by the constitutional rule of procedure. It is so provided. But this change cannot be made merely on the ground that the legislature has provided that some other county is the proper county in which the case should be tried. This would amount *pro tanto* to a legislative repeal of a constitutional provision. This is a logical conclusion from *Lewis v. Southern Pacific R. R. Co.*, 66 Cal. 209, and it was so declared in *Fresno National Bank v. Superior Court*, 83 Cal. 491. It was also stated in *Trezevant v. W. R. Strong Co.*, 102 Cal. 47. It was there said, speaking of section 16 of article XII of the constitution, that it "gives to a plaintiff the right to sue a corporation in either of the counties there-

in referred to, and the option thus given includes something more than simply the bare right to choose the county where the complaint shall be filed in the first instance, and confers upon a plaintiff the right, also, to prosecute such action in the county where it is commenced, unless the place of trial is changed for some other reason than that of the residence of defendant." It was further said, that the right claimed to a change of venue was inconsistent with the right given to plaintiff.

The citation of the constitutional debates is not fortunate. Section 16 of article XII of the constitution, though broad enough to include actions arising upon contract, was, I think, undoubtedly mainly designed to apply to actions against railroad corporations for damages. That such actions were removed to a distant county, where the corporation had its principal place of business, was the grievance to be redressed, and this is why it was made a constitutional rule of procedure with which the legislature could not tamper.

The order is affirmed.

McFarland, J., Garoutte, J., Harrison, J., Van Dyke, J., Henshaw, J., and Beatty C. J., concurred.

Rehearing denied.

[S. F. No. 2788. In Bank.—November 27, 1901.]

HENRY I. KOWALSKY, Petitioner, v. FRANK H. KERRIGAN, Judge of Superior Court, Respondent.

MANDAMUS—SETTLEMENT OF BILL OF EXCEPTIONS—DISMISSAL OF MOTION FOR NEW TRIAL—FAILURE OF MOVING PARTY—CONFLICTING EVIDENCE.—*Mandamus* will not lie to compel the trial judge to settle a bill of exceptions upon an order dismissing a motion for a new trial, where it was within the province of the judge to dismiss the motion and to refuse to settle the bill on the ground that the bill and amendments were not presented to the clerk for the judge within the statutory period, and that the evidence on the question of such failure is conflicting.

ID.—PROVINCE OF TRIAL JUDGE.—It is the province of the trial judge, in the first instance, to determine all questions of fact which arise in connection with the settlement of a statement or bill of exceptions, and his determination of the facts will not be disturbed in this court, except upon a clear showing of error, mistake, or abuse of discretion.

PETITION for writ of mandate to a Judge of the Superior Court of the City and County of San Francisco to settle a bill of exceptions. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

H. I. Kowalsky, and A. A. Sanderson, for Petitioner.

J. S. Reid, and William R. Jost, for Respondent.

THE COURT.—This is an original petition here for a writ of *mandamus* to require the defendant, as judge, to settle a certain bill of exceptions.

In an action entitled *Reed v. Kowalsky* (the petitioner herein), a judgment had been rendered in defendant's court in favor of plaintiff therein, and the court had dismissed a proceeding instituted therein by petitioner for a new trial, and this present petition is for a writ of *mandamus* to compel the judge to settle a bill of exceptions to the order dismissing the motion for a new trial.

The defendant refused to settle the bill, upon the ground that it, together with amendments thereto, had not been delivered to the clerk of the court for the judge within the statutory period. It is the province of the trial judge, in the first instance, to determine all questions of fact which arise in connection with the settlement of a statement or bill of exceptions, and in such case his determination of the facts will not be disturbed here, except upon a clear showing of his error, mistake, or abuse of discretion. In the case at bar, evidence was taken in this court on the issue whether the bill and amendments were delivered to the clerk before or after the expiration of the time allowed by law, and the most that can be said on the subject, favorable to the petitioner's contention, is, that the evidence on the question was conflicting. There is no such showing as would warrant us in setting aside the action of the judge in the premises.

The prayer of the petitioner is denied and the proceeding dismissed.

Garoutte, J., did not participate in the foregoing.

Rehearing denied.

[Sac. No. 850. Department Two.—November 27, 1901.]

THE GRIDLEY SCHOOL DISTRICT, etc., Appellant, v.
GEORGE H. STOUT et al., Respondents.

SCHOOL DISTRICT—CREDIT OF MONEY IN TREASURY—TRANSFER BY SUPERINTENDENT OF SCHOOLS—ACTION UPON OFFICIAL BOND.—A school district has no proprietary right to the money standing to its credit in the county treasury, and has no right to recover it, and cannot maintain an action against the county superintendent of schools, and his sureties upon his official bond, to recover money to its credit which the superintendent is alleged to have transferred wrongfully to the unappropriated school funds of the county, without authority of law to reapportion the same.

Id.—MISTAKEN PERFORMANCE OF DUTY—DISCRETION—SUPERINTENDENT OF SCHOOLS NOT LIABLE IN TORT—CORRECTNESS OF JUDGMENT NOT DETERMINED.—The superintendent of schools cannot be sued personally, in tort, for a mistaken performance of an official duty, involving the exercise of judgment and discretion. The question whether his judgment was rightly exercised will not be determined in an action upon his official bond, involving the transfer of school moneys.

APPEAL from a judgment of the Superior Court of Butte County and from an order denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion.

Jo D. Sproul, and A. F. Jones, for Appellant.

John Gale, for Respondents.

SMITH, C.—Appeal from a judgment for the defendants, and from an order denying the plaintiff's motion for a new trial. The case, briefly stated, is as follows: The suit was brought against the defendant Stout, who had been superintendent of schools of Butte County, and his sureties, to recover the sum of \$530, damages and costs. The cause of action alleged is, that the defendant Stout, as school superintendent, transferred to the unappropriated school funds of the county (it is alleged wrongfully) certain sums standing to the credit of the plaintiff in the county treasury,—to wit, May 11, 1898, \$230; and July 26, 1898, \$300.

The theory of the action is, that the plaintiff was entitled, under section 1621 of the Political Code, to use the unex-

pending balance remaining from the previous year for the payment of claims against the district, or for the year succeeding, and that the school superintendent had no authority to reapportion such moneys, except in the case provided in the section cited (which admittedly does not apply here), or in the case provided in subdivision 1 of section 1543 of the Political Code, which is: "Whenever an excess of money has accumulated to the credit of a school district by reason of a large census roll and a small attendance, beyond a reasonable amount necessary to maintain a school for eight months in such district for the year, the superintendent of schools shall place said excess of money to the credit of the unapportioned school funds of the county," etc. The claim of the appellant is, that, under this provision, the superintendent had no authority to reapportion the money.

Whether this be the case or not, it is clear that the action cannot be maintained. The plaintiff had no proprietary right to the money to its credit in the county treasury, and therefore no right to recover it. (*Kennedy v. Miller*, 97 Cal. 435.) Nor could the defendant be sued personally, in tort, for a mistaken performance of an official duty involving the exercise of judgment and discretion. (*Ballerino v. Mason*, 83 Cal. 449, 450, and authorities cited.) It will therefore be unnecessary to consider the sufficiency of the evidence to sustain the finding of the court that the accumulated balance to the credit of the plaintiff "arose by reason of a large census and a small early attendance," or the power of the school superintendent to determine that question, or, under the law, to judge of the necessity or propriety of the reapportionment.

I advise that the judgment and order appealed from be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 844. Department Two.—November 27, 1901.]

MARTIN WALSH et al., Respondents, v. J. P. BURKE et al., Appellants.

TAX DEED—INSUFFICIENT NOTICE TO REDEEM.—A tax deed cannot be sustained where it appears that the property was unoccupied, and that the notice to redeem was posted on the premises too late to bring it within the period of thirty days next previous to the expiration of the time for redemption, and that the notice was not published in every issue of a newspaper published during said period, nor during the period of thirty days next before the purchaser applied for a deed, as required by law.

ID.—AFFIDAVIT OF PURCHASER—REBUTTAL—SUPPORT OF FINDING.—Though the affidavit of the purchaser established the fact *prima facie* of a publication in the first paper published after the posting of the notice, evidence in rebuttal thereof is admissible; and the testimony of a witness, that he made a close examination of the newspaper of that date, and that the notice was not published therein, is sufficient to sustain a finding that there was an issue of the paper published on that day, and that the notice was not published therein.

ID.—ISSUE OF PAPER NEXT PRIOR TO TAX DEED—UNSUPPORTED FINDING—ABSENCE OF PROOF—CLAIMANT UNDER DEED NOT INJURED.—One who claims under the tax deed is not injured by an unsupported finding that there was a regular issue of the paper on July 4th, next prior to the tax deed dated July 11th, and that the notice of redemption was not published therein, where such claimant failed to prove either a publication of the notice on that date, or that there was no issue of the paper thereon.

ID.—BURDEN OF PROOF UPON CLAIMANT UNDER DEED—FINDING IN ABSENCE OF PROOF.—The burden of proof is upon the claimant under the tax deed to show a compliance with the statute as to the notice of redemption; and where there is an entire absence of proof in relation to the last publication required by the law to support the deed, it is the duty of the court to find against him on that fact; and the absence of proof in such case does not make the finding against evidence.

APPEAL from a judgment of the Superior Court of Placer County and from an order denying a new trial. J. E. Prewett, Judge.

The facts are stated in the opinion.

Jackson Hatch, for Appellants.

F. P. Tuttle, for Respondents.

CHIPMAN, C.—Action to quiet title to certain land. Defendant Burke disclaimed all interest in the property. Defendant Henry filed a separate answer, deraigning title through one Dependener, to whom the land was sold for non-payment of delinquent taxes assessed for the year 1892-93. Plaintiff had judgment, from which and from the order denying his motion for a new trial Henry appeals.

The court made the following findings: That the land in question was patented to the Central Pacific Railroad Company, and this company conveyed the land to Mary E. Walsh, who conveyed it to plaintiffs; the land was assessed for state and county taxes for the fiscal year 1892-93 to Mary Walsh, and became delinquent on June 26, 1893; the land was sold by the tax-collector, and was purchased by one Dependener on that day, and a certificate of tax sale was issued to him in the form required by law, "except that the same recited that the said property was assessed to Mary Walsh"; in May, 1894, the property was unoccupied, and the said Mary Walsh could not be found, and on May 29, 1894, Dependener issued a notice directed to Mary Walsh; this notice was in due form, described the property, stated that it had been sold for delinquent taxes, and gave the date of sale and the amount of the taxes, and that the right to redeem would expire on June 29, 1894, and that a deed would be demanded as soon as the right of redemption expires; the notice was posted in a conspicuous place on the land, on May 29, 1894; the Newcastle News was at all the times mentioned a weekly newspaper of general circulation, and published on Wednesday of each and every week; that said notice was published therein for the first time on June 6, 1894, and thereafter in the issues of said paper dated June 13, 20, and 27, 1894, but was not published on May 30, and was not published on July 4, 1894; "that there was a regular issue of said paper on May 30 and July 4, 1894"; on May 3, 1894, a copy of said notice was filed in the recorder's office; on July 11, 1894, the tax-collector executed to Dependener a tax deed for said property.

Respondents concede that appellant has in his brief successfully met all their objections to the tax sale made in the court below, except one point, on which they now rely,—namely, that there was no publication of the notice to redeem, as required by law. Section 3785 of the Political Code, as amended in 1891 (Stats. 1891, p. 134), provides as follows: That the purchaser of property sold for delinquent

taxes shall give a certain notice (stating what it shall contain, etc.) in case the property is occupied. "In the case of unoccupied property [which is this case], if the owner cannot be found, a similar conspicuous notice shall be posted, and kept posted, in a conspicuous place upon the property, during not less than thirty (30) days next before the expiration of the time for the redemption, or thereafter, next before the purchaser applies for a deed, which notice must also be published during the same period in a newspaper of general circulation, published in the county nearest the property, in every regular issue of such newspaper during the said period; and no deed of property sold at a delinquent tax sale shall be issued by the tax-collector, or any officer, to the purchaser of said property, until the notice herein provided shall have been given, and such purchaser shall have filed with such tax-collector, or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as required, and that due diligence has been used to notify the owner personally, which said affidavit shall be filed and preserved by the tax-collector as other files," etc.

Defendant's affidavit contained, among other statements, the following: That said notice (referring to the notice required to be posted) was kept posted in a conspicuous place upon said property during a period of not less than thirty days next before the application for a deed by said purchaser; "that said notice was also published during the same period in the Newcastle News, . . . and said notice was published in every regular issue of said newspaper during said period." J. S. Taylor, publisher of said newspaper, made proof of publication by affidavit, that said newspaper was a weekly newspaper, published on Wednesday of each week; "that the notice to redeem, hereto attached and made part hereof, was printed and published in said newspaper four consecutive weeks commencing in the issue dated on the sixth day of June and ending with the issue dated June 27, 1894; that said notice was published in the regular and entire issue of every number of said newspaper during the period and times of publication, in the newspaper proper, and not in a supplement thereto."

F. P. Tuttle, witness for plaintiff, in rebuttal, testified that, three years before this trial, he made an examination at Newcastle of the original files of the Newcastle News, in the course

of an examination into the title of the property in question; that he "made a close examination of the issue of May 30, 1894, and this publication did not appear in that issue." The foregoing is all the evidence as to publication. On this evidence the court made its findings that there was a regular issue of the paper on May 30 and July 4, 1894, and that the notice was not published in either of said issues. These findings are challenged as unsupported by the evidence. The affidavit of the purchaser established the fact *prima facie*, that publication was made on May 30th. But we think it was rebutted by the evidence of Mr. Tuttle as to the issue of May 30th, and that such rebutting evidence was admissible in this action. It is true, he does not testify distinctly that there was an issue of the paper published on that day, but he testified that he "made a close examination of the issue of May 30th," which he could not have done if he had not had it before him. I think the court was warranted in finding that there was an issue of the paper published on that day, and as there was evidence that the notice was not published in that issue, the finding is supported.

As to the finding that there was an issue of the paper published on July 4th, and that the notice was not published therein, the evidence is not so satisfactory. But it is clear that there is no evidence that the notice was published on July 4th, nor is such publication excused by showing that the paper was not issued on that day. The purchaser's affidavit was made on June 30th, and his statement therein that the notice was published in every regular issue of the paper during the thirty days before the deed issued is not evidence of what happened after June 30th, because he could not on June 30th know that the notice was published on July 4th, and his statement of such fact cannot be considered. The publisher's affidavit states the dates on which the notice was published, and the latest was on June 27th. It therefore does not prove any publication later, but rather leaves the inference that there was no later publication than June 27th. The recitals in the deed do not aid us, for there the latest publication mentioned is June 27th. There is, then, no evidence that the notice was published on July 4th. It was incumbent on defendant to show this fact affirmatively, or to show that there was no issue of the paper on that day. He has done neither, and as it was easily within his power to

have made the proof, it is fair to assume that he could not. The time for redemption expired June 26, 1894. The notice was not posted until May 29th,—manifestly too late to bring it within “thirty days previous to the expiration of the time for the redemption.” But the statute also requires the notice to be published “thirty days . . . next before the purchaser applies for a deed.” Assuming that he may start this latter notice before redemption has expired, the notice must be published “in every regular issue of such newspaper during the said period.” The deed is dated July 11, 1894, and the notice, therefore, to comply with the statute, must have been published July 4th, even if it be conceded that publication on May 30th was unnecessary.

Defendant was not injured by the unsupported finding that there was a regular issue of the newspaper on July 4th, and that the notice was not published therein. The burden being on defendant to show that he had complied with the statute, and having failed to do so, the court was justified in finding the fact against him. No other finding was possible under the circumstances. It is not the case of a finding against the evidence. Where a fact is in issue, and the party on whom rests the burden to prove it fails to introduce any evidence in support of the issue, it is the duty of the court to find against him on such fact.

The judgment should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1860. Department Two.—November 27, 1901.]

HANNAH E. WEINBERGER, Respondent, v. LELAND R.
WEIDMAN, Appellant.

MORTGAGE—STATUTE OF LIMITATIONS—NEW PROMISE AFTER BAR OF STATUTE—RENEWAL OF MORTGAGE.—The lien of a mortgage is not extinguished by lapse of time, so long as the principal obligation is kept alive, and suit can be brought upon the original promise; but a new promise, made after the bar of the statute has fully accrued upon the original promise, cannot have the effect to renew or continue the mortgage, the lien of which is extinguished by such bar of the statute.

ID.—RENEWAL OF NOTE—REDUCTION OF INTEREST—PLEADING—ARGUMENTATIVE AVERMENT OF EVIDENCE NOT ADMITTED—SUFFICIENCY OF DENIAL.—An averment that a certain sum is due, with interest at a specified rate, which is less than the face of the note, from a certain date, "such reduction of interest having been agreed to by both parties," on a date specified, prior to the bar of the note, is not an averment that the note was then renewed by a written promise signed by the defendant, and does not state the ultimate fact of promise to pay it, or any fact material to the plaintiff's case, but only contains mere argumentative matter of evidence of doubtful inference, inserted only to anticipate a defense, and the failure to deny the averment thus made does not admit it. Any possible implication of the renewal of the note is sufficiently denied by a denial that the defendant *ever* promised to pay the note.

APPEAL from a judgment of the Superior Court of Napa County and from an order denying a new trial. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

Webber & Rutherford, for Appellant.

Thomas Watt, and A. J. Hull, for Respondent.

TEMPLE, J.—This is an action to foreclose a mortgage given to secure the payment of a promissory note dated March 2, 1892, due one year from date. The action was commenced September 6, 1898, about eighteen months after the right of action was barred, unless there was a new promise or acknowledgment sufficient to keep the debt and the lien alive. The defense of the statute is made.

Anticipating the defense under the statute, or for the pur-

pose of founding the action upon a new promise, the plaintiff in his complaint attempts to aver a new promise to pay the debt, made April 16, 1897, in a letter written by the defendant to an agent of plaintiff. That was after the statute had run, and conceding that it was sufficient as a new promise upon which an action might be brought, it did not renew or continue the mortgage. This was determined in *Wells v. Harter*, 56 Cal. 342, which case was, as to this point, affirmed in *Southern Pacific Co. v. Prosser*, 122 Cal. 413. In the last-named case a distinction is pointed out between a new promise made before the statute has run and one made afterwards. The one keeps alive the first obligation, and if suit is brought, it must be upon the original promise, and so long as the debt is kept alive, the lien of the mortgage continues. If the new promise was made after the bar of the statute had accrued, the action must be based upon it. This was also held in *London etc. Bank v. Bandmann*, 120 Cal. 220.¹ This is equivalent to saying that a lien is not extinguished by lapse of time, so long as the principal obligation is kept alive, and that a promise or acknowledgment continuing in force the principal obligation is not a renewal or extension of the mortgage, within the meaning of section 2922 of the Civil Code.

But the respondent contends that the note was renewed by a sufficient acknowledgment in writing before the bar of the statute had accrued. No writing to that effect was shown, but it is argued that there is an admission to that effect in the pleadings, and in this way. In the averment that the note is due and unpaid it is said: "That there is now due and unpaid on said promissory note, from said defendant, Leland R. Weidman, to this plaintiff the principal sum of two thousand and twenty-eight dollars, and interest thereon at the agreed rate of eight per cent per annum, compounding annually, from the second day of September, A. D. 1894, all in United States gold coin, such reduction of interest having been agreed to by both parties on November 17, 1894." The note called for interest at the rate of nine per cent per annum, compounded semi-annually. It is contended that this mere recital, contained in the necessary allegation that the debt secured by the mortgage is still unpaid, carries in it the necessary inference of a promise in writing by the debtor to pay the debt, and thereby gave it a new term. Plaintiff

¹ 65 Am. St. Rep. 179.

avers, it is said, that the original contract was then altered, and as that could be done only in writing, the presumption is (it is argued) that the agreement to change the rate of interest must have been in writing.

There are difficulties in the way of the respondent in regard to this contention. The statement is not in the form of an allegation; in fact, nothing is asserted, nor is any claim founded upon it against the defendant. It is a mere explanation of the allegation as to the amount due. If defendant admitted the allegation, why should he deny the explanation? It is not material to plaintiff's case. Even if it had been intended to anticipate the defense of the statute, it still was no part of plaintiff's cause of action. Although it should appear from the complaint that the action was barred, still the complaint would be perfectly good, if the statute were not pleaded. A defendant is not bound to deny, and does not admit by not denying, allegations not essential to plaintiff's cause of action, but inserted merely to anticipate a defense. (*Canfield v. Tobias*, 31 Cal. 349; *Wormouth v. Hatch*, 33 Cal. 128.) Not only was this allegation not material to plaintiff's cause of action, but without it he could have recovered all that he could recover with it. It was wholly (as pleaded) in the nature of an admission of a partial defense on the part of the defendant.

If it can be regarded as an attempt to aver the renewal of the note, it was not an averment of the ultimate or issuable fact, but of mere evidence, and of such evidence as required argument to show that it was such. Allegations as to evidence are not admitted by failure to deny. (*Moore v. Murdock*, 26 Cal. 515; *Lowell v. Lowell*, 55 Cal. 316.) That the fact supposed to be essential can only be got out of the recital by doubtful inference, is itself fatal to respondent's contention. (*Campbell v. Jones*, 38 Cal. 507; *Stringer v. Davis*, 30 Cal. 318; *Denver v. Burton*, 28 Cal. 549; *Burkett v. Griffith*, 90 Cal. 532.¹) A different rule would permit practice calculated to beguile an unwary adversary.

Besides all this, the inference that there was an agreement signed by the defendant is entirely unwarranted. We must presume that the pleader has stated the case as favorably to himself as possible. The allegation is merely that the cred-

¹ 25 Am. St. Rep. 151.

itor remitted a part of his claim. It was sufficient that, being supported by a valuable consideration, it was signed by the plaintiff alone. The change in the contract added nothing to the obligations of the defendant, nor did it change them otherwise than that it relieved him from a portion of his burden in reducing the amount of his debt.

Lastly, if it can be considered that this recital contains in its belly a concealed allegation of a renewal, it is specifically denied in the answer, wherein defendant denies that he *ever* promised to pay the note. The promise to pay is that which renews the obligation, and no acknowledgment is sufficient unless it at least implies a promise, and the promise was the ultimate fact to be averred. (Wood on Limitations, sec. 64.)

As to the testimony of plaintiff to the effect that at the request of defendant she had agreed with him to remit a portion of the debt, it was immaterial whether such agreement was in writing, or even whether it was valid. Defendant was not called upon to object, even though it had never been made at all. It would be a travesty upon a trial in a court to now put a construction upon this evidence which it would have been unreasonable for the defendant to have put upon it at the time.

The idea seems to possess counsel, and possibly to some extent the trial court, that the defendant justly owes the plaintiff, and ought not to plead the bar of the statute, and that the court should be diligent to find some excuse for preventing that result. But it is for the legislature, and not for the courts, to determine when the bar of the statute is a legal and proper defense. The policy is plainly laid down, that debts must be collected within certain periods, reduced to judgment, or kept alive in the mode designated, or they will be barred.

Judgment and order reversed and a new trial ordered.

McFarland, J., and Henshaw, J., concurred.

[Sac. No. 1749. In Bank.—November 29, 1901.]

MOSES HAMILTON, Administrator, etc., Appellant, v.
MARIA S. HUBBARD et al., Respondents.

HUSBAND AND WIFE—COMMUNITY AND SEPARATE PROPERTY—PRESUMPTION—GIFT FROM HUSBAND TO WIFE—CONVEYANCE BY THIRD PARTY—The presumption that property acquired by either spouse during marriage is community property cannot apply where the transaction was, in effect, a gift from the husband to the wife, and the conveyance was made to her with the husband's consent, by a third party, in pursuance of the husband's agreement with the grantor for an exchange of his separate property for the lot deeded by him.

ID.—PAYMENT OF CONSIDERATION—RESULTING TRUST NOT PRESUMED—PRESUMPTION OF ADVANCEMENT OR GIFT.—The presumption of a resulting trust in favor of one who advances the consideration for a conveyance taken in the name of another, only applies between strangers to each other, and does not apply where the conveyance is to any person for whom the person paying the consideration is under some natural, moral, or legal obligation to provide. In such case, the presumption is, that the purchase and conveyance was intended to be an advancement or gift for the benefit of the nominal purchaser or grantee.

ID.—FINDING AGAINST EVIDENCE.—A finding that property proved to have been deeded to the wife by a third party, at the husband's request, in exchange for the separate property of the husband, conveyed to the grantors, is the community property of the husband and wife, is against the evidence.

ID.—APPEAL—STALENESS OF DEMAND NOT SHOWN.—Where the complaint does not show a stale demand, and there is nothing in the findings or conclusions of the court to support such a defense, the point that the plaintiff's demand is stale cannot be sustained upon appeal.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. G. W. Nicol, Judge presiding.

The facts are stated in the opinion rendered in Department Two.

A. H. Carpenter, for Appellant.

Budd & Thompson, and Louttit & Middlecoff, for Respondents.

THE COURT.—Upon a careful reconsideration of this case we are convinced that there is no substantial conflict in the evidence, and that there is nothing to support the findings of the superior court to the effect that the lot in controversy, upon its conveyance to Mrs. Hamilton, became community property. The Department opinion will therefore stand.

The point is made in the petition for rehearing that the plaintiff's demand is stale. This position cannot be sustained. The complaint, on its face, does not show a stale demand, and there is nothing in the findings or conclusions of the superior court to support such a defense.

The judgment and order appealed from are reversed.

The following is the opinion above referred to, which was rendered in Department Two, May 29, 1901:—

SMITH, C.—The plaintiff is the administrator of Frances Hamilton, his deceased wife, to whom he was married May 22, 1867, and who died March 29, 1887. He sues as administrator, to quiet the title of her estate to lot No. 3, block 56, etc., in the city of Stockton. Both parties deraign title under a deed from one Weber to Frances Hamilton, the deceased, of date July 6, 1867, purporting to convey to her the lot in question,—the *plaintiff*, as her administrator; the *defendant*, under foreclosure of mortgage made to her, August 26, 1892, by the plaintiff, in his personal capacity, and commissioner's deed executed to him in pursuance thereof.

The court found that the property in question was the community property of Moses Hamilton and his deceased wife. But this finding rests wholly upon the deed of Weber to the latter,—the acknowledged source of title of both parties. Hence the question presented is as to the effect of this deed. If the deceased Frances, as grantee therein, took the property conveyed as her separate property, the plaintiff, as her administrator, was entitled to recover; otherwise not.

Under our law as it stood prior to the amendment of section 164 of the Civil Code, March 19, 1889, the presumption was that all property acquired by either spouse during marriage was community property. (*Meyer v. Kinzer*, 12 Cal. 247; 1 Notes on Cal. Rep. 547, 548; Civ. Code, secs. 162, 163, 164.) Hence, assuming (without deciding) that the amend-

ment of section 164, March 19, 1889, and the subsequent amendments of March 3, 1893, and of March 4, 1897, did not change the rule with reference to deeds made prior to the first amendment, the presumption, in the absence of evidence to the contrary, would be that Frances, the grantee in the deed in question, took the property for the community. But here there is a recital in the deed that it is made "in consideration of one dollar, and *exchange for lot No. 13, in block Q west*," etc.; and it appears from the evidence, without contradiction, that the lot mentioned—"No. 13"—was the separate property of Moses, the husband, owned by him before the marriage; and from a deed made by him twelve days after the deed to his wife—conveying to Weber lot No. 13, and reciting as the consideration "one dollar, and *exchange for lot 13, in block 56*," etc.,—it further appears that the deed of Weber to Frances was made with his consent, and in pursuance of his agreement with the grantor. Thus far the nature of the transaction is apparent, and there is no room for presumption. We have therefore only to determine the legal effect of the facts thus established; and this under well-established and familiar principles of the law (assuming for the present that the result would not be affected by the peculiar laws of this state, affecting the marital relations), is sufficiently obvious.

A deed of conveyance is not merely evidence of a gift or other grant. It is the gift or grant itself, and *ipso facto* operates to transfer or convey the title of the property described to the grantee (Civ. Code, secs. 1053, 1146; *Shanahan v. Crampton*, 92 Cal. 11, 13); nor—unless under the peculiar rules of equity, to raise a trust—can its terms or legal effect be contradicted. Ordinarily, indeed, where a conveyance is made to one and the consideration paid by another, a trust is "presumed" in favor of the latter. (Civ. Code, sec. 583.) But this presumption arises only in transactions between "strangers to each other" (1 Perry on Trusts, sec. 126), and is not indulged where the conveyance is to the "wife or child, or other person for whom [the person paying the consideration] is under some natural, moral, or legal obligation to provide." In such cases the presumption is, "that the purchase and conveyance were intended to be an advancement for the nominal purchaser." (1 Perry on Trusts, sec. 143; Hill on Trustees, (97), and note.) The transaction was therefore a gift to Mrs. Hamilton, and, under the express

provisions of the code, her separate property. (Civ. Code, sec. 162.)

Nor are there any provisions of the code, or decisions of this court, that affect this result otherwise than as confirming it. Under our law, a husband may make a deed—whether of his own or community property—to his wife, and in such case it is well settled that, in the absence of evidence of a contrary intent, the deed will vest in her the land conveyed as her separate property. (Civ. Code, sec. 158; *Tillaux v. Tillaux*, 115 Cal. 672; *Ions v. Harbison*, 112 Cal. 260; *Carter v. McQuade*, 83 Cal. 274; *Burkett v. Burkett*, 78 Cal. 310;¹ *Taylor v. Opperman*, 79 Cal. 468.)

In the last-named case, the rule is thus stated by the court: "In the absence of any evidence of intention outside of the deed, it must be taken as evidencing the intention which, upon its face, it imports; . . . to deny it that effect would be to render the deed inoperative and void. (*Story v. Marshall*, 24 Tex. 305.²) . . . The *prima facie* presumption arising from a deed of the husband to the wife of community property is, that it was intended to change its character from community property to the separate property of the wife." (Citing *Platt on Property Rights of Married Women*, sec. 34.) The contrary was held in an early case in this state (*Kohner v. Ashenauer*, 17 Cal. 581), and in the Texas cases there cited; but these decisions must be regarded as overruled by the later authorities. The principal of the cases cited applies equally to the case here. There is no essential distinction between a deed direct from husband to wife, and a deed from him to her *per interpositam personam*. (*Michod v. Girod*, 4 How. 553; *Smith v. Strahan*, 16 Tex. 321;³ *Baldridge v. Scott*, 48 Tex. 189.)

Possibly, with reference to the latter case, it may be claimed that where the consideration of the deed to the wife is community property, a presumption may arise—or, rather, might have arisen prior to the amendment of section 164 of the Civil Code—that the conveyance to the wife was for the use of the community; and it is in fact so held in Texas with regard both to deeds from husband to wife and deeds to her from third parties by his direction; though with regard to the former, as we have seen, the doctrine has been repudiated

¹ 12 Am. St. Rep. 58.

³ 67 Am. Dec. 622.

² 76 Am. Dec. 106.

in this state. But the rule has no application, either in terms or intention, to cases where the consideration is the separate property of the husband. Accordingly, in the Texas cases cited *supra*, it is held that in such cases the presumption is in favor of the wife's right, and that she takes to her own use. And the same distinction is made in *Kohner v. Ashenauer*, 17 Cal. 581, and in the previous case of *Meyer v. Kinzer*, 12 Cal. 251.¹ Nor in the numerous decisions in this court in which deeds to the wife by direction of the husband have been held to inure to her use has the contrary ever been ruled. Nor indeed is it held in any of those cases that the rule would be otherwise, even in cases where the consideration is community property. In all of them, indeed, some circumstance, in addition to the mere conveyance to the wife by direction of the husband, appeared,—as, e. g., declarations of the husband at the time of the deed, or the use, in the deed, of the expression, “as her separate property,” or similar expressions. But it cannot be inferred that in the absence of the particular circumstances shown in these cases, the decisions would have been otherwise. (*Peck v. Brummagin*, 31 Cal. 444;² *Higgins v. Higgins*, 46 Cal. 263; *Swain v. Duane*, 48 Cal. 358; *Read v. Rahm*, 65 Cal. 344; *Jackson v. Torrence*, 83 Cal. 529.) Nor if it could be so inferred, and the rule assumed that in such cases the presumption should be against the wife, would the case here be affected; for the consideration in this case was not community property, but the separate property of the husband; and with reference to such cases, the rule, as we have seen, is different. The case is, in principle, precisely the same as though the consideration had been paid by the father of the wife, and the deed made to her by his direction.

I advise that the judgment and order appealed from be reversed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Henshaw, J., Temple, J., McFarland, J.

¹ 73 Am. Dec. 538.

² 89 Am. Dec. 195.

[L. A. No. 988. Department One.—November 29, 1901.]

**THE CITY OF ANAHEIM, Appellant, v. CLEMENTINE
LANGENBERGER, Respondent.**

**DEDICATION OF PLAZA—RECORDED PLAT AND MAP—CONVEYANCES OF
LOTS—RIGHTS OF PUBLIC—OFFER TO DEDICATE—ACCEPTANCE—RE-
VOCATION.**—The description of a plaza upon a recorded map and
plat of land, according to which lots were sold and conveyed, what-
ever rights may be thereby conferred upon the purchasers of lots,
only constitutes an offer to dedicate the plaza to public use, so far
as the rights of the public are concerned. An acceptance of the
offer by the public is essential to constitute a dedication as to it,
and the offer may be revoked, as to the public, at any time before
its acceptance thereof.

**ID.—ACTION BY CITY TO QUIET TITLE—PLEADING—ADVERSE CLAIM—
REVOCATION OF OFFER.**—Where it appears that the offer to dedi-
cate the plaza was made twenty years before the commencement of
an action by the city to quiet title thereto, during which period
there was no express or implied acceptance of the offer by the
public, and the complaint alleges an adverse claim of the defendant
to the land involved, such allegation indicates a revocation of the
offer prior to the filing of the complaint.

ID.—FINDING AGAINST DEDICATION—ABSENCE OF PROOF OF ACCEPTANCE.
—In the absence of proof of an acceptance by the city of the offer
to dedicate the plaza prior to the commencement of the action, the
court was justified in finding that there was no dedication of the
plaza to public use.

APPEAL from a judgment of the Superior Court of
Orange County and from an order denying a new trial. J.
W. Ballard, Judge.

The facts are stated in the opinion of the court.

H. W. Chynoweth, for Appellant.

Z. Montgomery, R. Melrose, and John D. Pope, for Re-
spondent.

GAROUTTE, J.—This action is brought to quiet the title
to a certain tract of land situated within the limits of the city
of Anaheim. Plaintiff appeals from the judgment and order
denying its motion for a new trial.

Defendant's predecessor in interest platted a certain tract of
land within the limits of the city of Anaheim, by dividing it

into lots, blocks, etc., and filed the plat or map thereof in the office of the county recorder of the county. Thereafter he sold a number of lots to various parties, describing them by reference to the aforesaid recorded plat. This defendant, his successor in interest, likewise sold various lots. According to this plat, a certain tract is marked thereon as a plaza, and a portion of this plaza tract is the land involved in the present litigation, the plaintiff claiming that it was dedicated to the public as a park, or plaza, by the owner thereof. The trial court decided that there was no dedication to the public, and thereupon rendered judgment against the city.

In the briefs filed by the city it is declared: "The contention of plaintiff is, that the proprietors of said lands, in making the map and plat, and in placing the same as a public record of the county of Los Angeles, in the county recorder's office, operated as an offer on their part to dedicate the place marked 'plaza' to the purposes of an open, public, town plaza, for the use of the inhabitants of the town and the public; that in immediately following up the making and filing said map for record by sales and conveyances by them of lots in said subdivision to *bona fide* purchasers, in accordance with such map and plat, ~~such offer to dedicate~~ became absolute and irrevocable." As matter of law, it cannot be said that dedication follows from the facts above set forth by plaintiff. Indeed, as a matter of fact we doubt if a court would be justified in declaring the ultimate fact of dedication to result from those probative facts. As far as the city is concerned, the court attaches little importance to the fact that the owner sold lots according to the plat or map on file in the recorder's office. Such acts by the owner may sometimes indicate an intention to dedicate a street or plaza, but in this case an intention to dedicate is amply shown by the filing of the map. And it may be said that the filing of a map has always been held to constitute an offer to dedicate. It is said in *Sacramento v. Clunie*, 120 Cal. 32: "In the consideration of the question here presented, it must be borne in mind that the litigation is alone between the owner and the city. The question is purely one of dedication. The respective rights of the owners of the blocks who may have purchased from the parties filing the map are not involved. Such sales may be some evidence of intention to dedicate, but nothing more. The respective rights of owners rest upon other and different prin-

ciples of law." It thus appears that in a case involving the facts here presented, the act of the owner in selling lots according to the recorded plat is more important as evidence in a case between the owner and the purchaser, than in a case where the city is claiming a dedication to the public.

In *Los Angeles v. Kysor*, 125 Cal. 466, the law is thus succinctly declared: "Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer by the public. Only two parties are necessary to a dedication,—the owner upon the one side, and the public upon the other. There can be no dedication without the participation of both; and no dedication can be stronger or more binding by the participation or intervention of others. The offer of the owner to dedicate may be manifested in a hundred different ways; and the acceptance of the offer by the public may be manifested in a like number of ways."

In *Schmitt v. San Francisco*, 100 Cal. 307, the case of *Archer v. Salinas City*, 93 Cal. 53, is quoted with approval, where it was said: "The owner, after selling some of the lots according to such map, might, either with the consent of the purchasers, or if he should himself repurchase all of the lots so sold, withdraw such offer at any time before the public has acquired any interest in the streets, either from formal acceptance or by actual user." The facts there stated are exactly the facts relied upon by plaintiff, whereby its counsel declares "such offer to dedicate became absolute and irrevocable." Tested by the principle declared in the Salinas City case, if this defendant had at any time prior to the commencement of this action repurchased all of the lots sold according to the recorded map, plaintiff's claims would surely be a nullity; for defendant would then have had the right to withdraw the offer of dedication. It is thus evident that some material fact going to establish dedication is absent from the statement of facts relied upon by plaintiff's counsel.

By the facts of this case, there appears to be nothing more than an offer to dedicate the plaza to the public. The offer was made more than twenty years before this action was brought. During that entire time the city never made a sign that it accepted the offer. No formal acceptance was entered; no implied acceptance is shown. The first intimation the city gave of its claims to the plaza is found in the

commencement of the present action. Certainly, the commencement of this action can hardly constitute an acceptance of an offer to dedicate made twenty years before. The complaint sets out that defendant claims the land here involved adversely to it. This allegation of the pleading indicates that defendant had at some time prior to the filing of the complaint revoked the offer of dedication theretofore made. There being no evidence in the record indicating any acceptance, upon the part of the city, of the offer to dedicate, the trial court was entirely justified in holding that no dedication took place.

The court finds no substantial merit in the exceptions of plaintiff to the rulings of the court in the admission and rejection of testimony.

For the foregoing reasons the judgment and order are affirmed.

Harrison, J., and Van Dyke, J., concurred.

[Sac. No. 837. Department One.—November 29, 1901.]

THE PEOPLE, Plaintiff, v. JOHN MADDEN et al., Defendants. JOHN E. RAKER, Appellant. JOHN MCGAHEY, Intervener, Respondent.

APPEAL—JUDGMENT FOR COSTS—TEST OF JURISDICTION—AMOUNT CLAIMED IN COMPLAINT.—In an action in the name of the people upon the official bond of a county treasurer, the amount claimed in the complaint is the test of jurisdiction; and where that amount was sufficient to give jurisdiction to the superior court, and to this court upon appeal, and the action was wrongfully dismissed on the ground of want of authority of the district attorney to prosecute it, a judgment rendered against the district attorney for costs in the sum of \$18.75 was part of the general judgment, which this court has jurisdiction to review and reverse upon appeal.

APPEAL from a judgment of the Superior Court of Modoc County. J. W. Harrington, Judge.

The facts are stated in the opinion in this case and in the opinion rendered in *People v. Madden*, 133 Cal. 347.

Spencer & Raker, and Clarence A. Raker, for Appellant.
G. F. Harris, for Respondent.

SMITH, C.—In the above-entitled case—which was a suit brought in the name of the people of the state against the defendant Madden, as treasurer of Modoc County, and his sureties,—judgment was entered on the motion of John McGahey, intervener, and now respondent, against the plaintiff, for the dismissal of the action, and against John E. Raker, the appellant,—who was plaintiff's attorney, and not otherwise connected with the case,—for costs. Appeals were taken by both parties affected, and on the appeal of the plaintiff the judgment was reversed, leaving the appeal of Raker still pending, though in effect determined. (*People v. Madden*, 133 Cal. 347.) It remains only, therefore, to enter the same judgment on the present appeal. The only point urged to the contrary that need be considered is, that the amount of the judgment (\$18.75) was insufficient to give this court jurisdiction. But the judgment against the appellant was part of the general judgment rendered in a case of which the superior court had jurisdiction; and it follows, under the provisions of the constitution and the code, that this court has jurisdiction to review it. (Const., art. VI, secs. 4, 5; Code Civ. Proc., secs. 52, 57; *Dashiell v. Slingerland*, 60 Cal. 653; *Lord v. Goldberg*, 81 Cal. 596.¹) The test of jurisdiction is the amount claimed in the complaint, which in this case was \$34,825.35. (*Dashiell v. Slingerland*, 60 Cal. 653, 656.) Accordingly, it was so held in the case of *Raker v. Superior Court* (Cal., Feb. 28, 1900), where a writ of *certiorari* was denied on the ground that petitioner had an adequate remedy by appeal.

We advise that the judgment be reversed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Harrison, J., Garoutte, J., Van Dyke, J.

¹ 15 Am. St. Rep. 82.

[S. F. No. 1786. Department Two.—November 29, 1901.]

FRANKIE WHITE, Plaintiff, Respondent, v. JOHN H. WISE and GEORGE E. WHITE, Defendants. JOHN H. WISE, Appellant.

INJUNCTION AGAINST DISPOSITION OF HUSBAND'S PROPERTY—EXCEPTION OF "ORDINARY BUSINESS"—DEED IN GOOD FAITH TO PAY DEBT—PRESUMPTION.—An injunction restraining the defendant in a divorce suit from disposing of his property, real or personal, pending the suit, excepting that he was permitted to carry on his usual and ordinary business, will, in the absence of proof to the contrary, be presumed to include within the exception of "ordinary business" a conveyance made in good faith by the defendant to pay an honest debt, of long standing, to a creditor, who accepted the same in good faith, in satisfaction of his demand.

ID.—SPECIFIC FINDINGS—INCORRECT CONCLUSION OF LAW—VIOLATION OF INJUNCTION—RIGHT TO JUDGMENT.—In an action involving the validity of such deed, where the court made specific findings as to the absence of fraud, and as to the good faith of the parties to the conveyance made and taken in satisfaction of such debt, a further finding made that the transaction was not in the ordinary course of business, and was in violation of the injunction, and void, must be regarded as of a mere conclusion of law incorrectly drawn from the specific facts found, and inconsistent therewith, and the holder of the deed is entitled to judgment upon the findings.

APPEAL from a judgment of the Superior Court of Mendocino County. J. M. Mannon, Judge.

The facts are stated in the opinion of the court and in the former decisions therein referred to.

Seawell & Pemberton, for Appellant.

Johnson, Linforth & Whitaker, W. H. Linforth, W. T. Baggett, and J. Q. White, for Respondent.

THE COURT.—This suit was brought to quiet the plaintiff's title to the land in controversy, as against a deed executed by the defendant White to the defendant Wise, of date April 5, 1893, at which time, it is admitted, the former was the owner of the land described in the deed. The plaintiff, who is the divorced wife of the defendant White, de-rains title to the same land under a sale subsequently made to her by the receiver in a former suit, in which the defendant White was plaintiff and she defendant, which sale was

confirmed by the court, May 5, 1896, and followed by a deed conveying to her "all the right, title, and interest of said George E. White in and to the lands . . . sold . . . by the said receiver to this plaintiff, including the premises described in the complaint." The court held that the deed of White to Wise was in contravention of an injunction contained in the interlocutory judgment in the case referred to, by which the plaintiff (now defendant) was enjoined, pending the suit, from disposing of or encumbering his separate property, real or personal, or any part thereof, with the exception "that plaintiff [should] be permitted to pursue and carry out his usual and ordinary business." The terms of this decree are more fully given in the reports of the several cases in which it has been before this court for consideration. (*White v. White*, 86 Cal. 219; *Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488; *Sun Ins. Co. v. White*, 123 Cal. 196.)

On the trial, the case was dismissed as to the defendant White, and as to the defendant Wise it was adjudged that his deed from White was void for the reason stated, and that the plaintiff was owner of the land in controversy. This judgment must rest for its justification on the truth of two propositions, namely: 1. That the receiver's sale was valid, and his deed effectual to convey to the plaintiff the title of White; and 2. That the deed from White to Wise was void, or at least voidable.

For the purposes of this consideration the soundness of the first proposition may be conceded, though it should be understood that the concession is in no respect a determination of the question; for that determination becomes unnecessary in view of the conclusion reached and hereinafter expressed,—namely, that the deed of White to Wise is a valid operative conveyance of title.

With regard to the defendant's title, the case presented is this: It is, in effect, alleged in the complaint, in addition to the proceedings in the case of *White v. White*, above set forth, that the conveyance from White to Wise was made for the purpose of cheating and defrauding the plaintiff, by preventing the premises conveyed from being taken possession of by the receiver, or from being otherwise applied to the satisfaction of any judgment that might be obtained by the plaintiff, and that the deed was the result of a conspiracy entered into by White and Wise for such purposes. But the court found that all these allegations were untrue,

and, as alleged in the answer, that White was at the date of the deed, and for some years prior thereto had been, indebted to the plaintiff in the sum of three thousand two hundred dollars, and was without means of paying the debt, otherwise than by disposing of property for that purpose, and that the deed was made in satisfaction of this indebtedness.

It was also alleged in the defendant's answer that the conveyance "was made and accepted in good faith, . . . and solely and only for the purpose of securing" the payment of his debt; and though there is no express finding on this allegation, this, in view of the findings on the issue of fraud, must be presumed to have been the case. (Code Civ. Proc., sec. 1963, subd. 1.) It is, indeed, found that the conveyance was taken with full knowledge of the existence of the injunction, and "in disregard and violation thereof," and that "the effect [of the deed] was and is to prevent, hinder and delay" the plaintiff in enforcing her judgment; and it is further found "that the making . . . of said instrument was not within the usual or ordinary business of said George E. White." But neither of these findings is inconsistent with the good faith of the defendant in taking the deed; and in view of the findings upon the issue of fraud, and the absence of any finding on the defendant's express allegation that the deed was taken in good faith solely for the purpose of securing the payment of his debt, it must be presumed that such was the case. Otherwise it would be necessary to reverse the judgment for lack of a finding on this point.

With regard to the finding that the making of the deed "was not within the usual or ordinary business of . . . White," it is objected—as was in fact the case—that there was no evidence to the contrary, and (on the authority of *Sun Ins. Co. v. White*, 123 Cal. 203) that in the absence of such evidence the transaction must be regarded as falling within the terms of the exception. In the case cited, the note and mortgage had been given by White prior to the entry of the interlocutory decree and the injunction therein contained; but "by an agreement between [the parties] the amount thereof was to be paid to him at such times and on such terms as might be agreeable to both. Of the principal sum named in the note, about eight thousand dollars was paid after the entry of the interlocutory decree in the divorce case, and it was contended by the appellant (Mrs. White) that the plaintiff's lien should be postponed to hers." The

lien was therefore in fact created—as to this amount—subsequently to the injunction, and the case was the same as though the mortgage had been then given. But the court said that “in the absence of any evidence to the contrary, it must be held that the receipt by him, from the plaintiff, of the amount remaining unpaid upon the note that he had previously executed, and the payment thereof by the plaintiff, was within the terms of the exception.” The case, therefore, seems to be in point; and were it necessary,—assuming, without affirming, the sufficiency of the specifications referring to this finding,—a new trial should be granted on the ground that the finding is not justified by the evidence. But in the view we take of the case this will be unnecessary.

It is expressly found that there was no fraud, and that the deed was taken in satisfaction of a debt of several years' standing. In the absence of fraud, or of any intent to hinder or delay the plaintiff in her action, such a transaction must be regarded as coming clearly within the terms of the exception; for it cannot be doubted that the payment of a *bona fide* debt is in the course of the “usual and ordinary business” of the honest debtor. Nor can it make any difference whether the payment is made in money or property. The injunction, in its terms, referred to personal as well as real property, and to money, and choses in action, as well as to other kinds of the former; and to give it the effect contended for would be to forbid the payment of debts in any way. The findings that the transaction was not in the course of the usual and ordinary business of White, and that it was consequently in violation of the injunction, must therefore be regarded as mere conclusions of law incorrectly drawn from the specific facts found, and inconsistent therewith.

The conclusion reached renders it unnecessary to consider other points made by the appellant.

The judgment is reversed and the cause remanded, with directions to the lower court to enter judgment on the findings for the appellant as prayed for in his answer.

Hearing in Bank denied.

[S. F. No. 1785. Department Two.—November 29, 1901.]

JOHN H. WISE, Appellant, v. JOEL EVELAND, Respondent.

EJECTMENT—LANDLORD AND TENANT—ATTORNMENT.—The holder of the legal title may maintain ejectment against a tenant who has denied his title and wrongfully attorned to another claimant, who has no title to the demanded premises.

ID.—ATTORNMENT TO DIVORCED WIFE—INJUNCTION AGAINST HUSBAND—EXCEPTION OF "ORDINARY BUSINESS"—DEED TO PLAINTIFF TO PAY DEBT—CASE AFFIRMED.—Where the defendant had attorned to a divorced wife, who had sold her husband's property in a divorce suit, in which the husband had been enjoined from disposing of his property pending the suit, with the exception that he might carry on his "usual and ordinary business," and the court found against the defendant on the denials of his answer, and on the defense of attornment found that the husband had, pending such suit, conveyed the property in dispute to the plaintiff, without fraud, to pay a *bona fide* debt, such finding shows title in the plaintiff, and not in the wife, and the attornment of the defendant to her is not a sufficient defense. (*White v. Wise, ante, p. 613, affirmed.*)

APPEAL from a judgment of the Superior Court of Mendocino County and from an order denying a new trial. J. M. Mannon, Judge.

The facts are stated in the opinion of the court and in the opinion in the case of *White v. Wise, ante, p. 613*.

Seawell & Pemberton, for Appellant.

William T. Baggett, Linforth & Whitaker, W. H. Linforth, and J. Q. White, for Respondent.

THE COURT.—The appeal here is from the judgment and from an order denying the plaintiff's motion for a new trial, but the case may be disposed of on the appeal from the judgment. The suit was brought to recover the land described in the complaint (which is the same as that involved in *White v. Wise, ante, p. 613*), and damages for detention. The complaint alleges the plaintiff's ownership of the land, the execution of various leases to the defendant,—the last of date November 1, 1895, for the term of one year,—the wrongful withholding of the land by him, and that the value of the premises while so withheld was five hundred dollars.

The answer of the defendant denies the plaintiff's ownership, and admits the execution of the leases, but denies that he took possession of the premises from plaintiff or as his tenant, or that he has ever held possession under the leases, or that he wrongfully withholds the land, or that the value of the premises during the time referred to in the complaint was five hundred dollars or any sum; and as affirmative matter, it sets up the facts alleged in the complaint in *White v. Wise*, ante, p. 613, and that prior to the commencement of the action defendant had attorned to the plaintiff in that case on her demand. The court found adversely to the plaintiff on the issues made by the denials of the answer, with the exception that it found the value of the rents and profits to be \$150 per year from the first day of November, 1896; but on the affirmative defense, it found the facts as found in *White v. Wise*, ante, p. 613. The case, therefore, is, in principle, the same, and the decision there must be decisive of this case.

The judgment is reversed and the cause remanded.

Hearing in Bank denied.

[Crim. No. 819. Department Two.—November 30, 1901.]

THE PEOPLE, Respondent, v. ROBERT McFARLANE,
Appellant.

CRIMINAL LAW—TRIAL—EVIDENCE—TESTIMONY UPON PRELIMINARY EXAMINATION—CONFLICTING TESTIMONY AT FORMER TRIAL—IMPEACHMENT.—Upon the trial of a defendant accused of felony, where the prosecution introduced the testimony of a witness taken upon the preliminary examination, and the defendant, for the purpose of contradicting the witness, introduced his evidence taken upon a previous trial, the witness did not thereby become the witness for the defendant, within the rule that a party cannot impeach his own witness, and it was error for the court to refuse to allow the defendant further to impeach the witness by evidence of his bad character.

ID.—IMPEACHMENT BY PARTY CALLING WITNESS—CONSTRUCTION OF CODE—EXCEPTIONS TO RULE.—Section 2049 of the Code of Civil Procedure, forbidding a party, in general terms, to impeach his own witness by evidence of bad character, is but the enactment of the previously existing general rule, which allowed of exceptions thereto. The rule does not apply where the calling of the witness is not vol-

untary, or where it becomes necessary to call the adverse party, or where the witness was first called by the adverse party, and is called by the other party for purposes connected with his original testimony, and especially where he is entitled to prove his different sworn statements, without opportunity of cross-examination with reference thereto.

APPEAL from a judgment of the Superior Court of Merced County and from an order denying a new trial. M. T. Dooling, Judge presiding.

The facts are stated in the opinion.

Frank H. Farrar, and G. G. Goucher, for Appellant.

Tirey L. Ford, Attorney-General, A. A. Moore, Jr., Deputy Attorney-General, and John F. McSwain, District Attorney of Merced County, for Respondent.

SMITH, C.—The defendant was tried upon an information charging him with murder, and convicted of manslaughter, and appeals from the judgment and from an order denying his motion for a new trial. The grounds urged for reversal are error in the exclusion of evidence and in the instructions.

On the trial, the testimony of witness Penycok, taken on preliminary examination of the defendant, was read in evidence by the prosecution, and afterwards the defendant offered to introduce the testimony given by the same witness on a former trial, for the purpose of contradicting his evidence as given on the preliminary examination, and introduced by the prosecution. The evidence offered was objected to, and the objection overruled. But the court said, in effect, on admitting it, that the testimony could not be limited to the purposes stated in the offer, and if introduced it must go to the jury for what it was worth, "just the same as if the witness . . . was called by them" (i. e., by the defendant's attorneys). The testimony was then introduced. Afterwards the defendant offered to impeach the witness by evidence of bad character, offering numerous witnesses for that purpose, but the evidence was excluded on the ground, in effect, that the witness sought to be impeached was the witness of the defendant, and therefore, under the provisions of section 2049 of the Code of Civil Procedure, could not be thus impeached. This, we think, was error. The provision of the code cited is but the re-enactment of a rule pre-

viously existing, which allowed several exceptions,—as, for example, where the evidence of the witness is made necessary by the law, as in case of an attesting witness, or where it becomes necessary for a party to call his adversary as a witness; and the same principle would seem to apply to a case like this, where the defendant was entitled to bring to the attention of the jury the differing statements of the witness, and where he had no opportunity of cross-examining him with reference to them. (Best on Evidence, sec. 645, and note, p. 601.) The rule as commonly stated is, “that a party shall not be allowed to . . . discredit his own witness” by evidence of character; and the ground of the rule is, that “by calling a witness, the party represents him to the court as worthy of credit,” and he is estopped afterwards to show the contrary. (Best on Evidence, sec. 645.) But this reason, and the rule grounded on it, can have no application where the calling is not voluntary. Generally, therefore, a witness is to be regarded as the witness of the party first calling him, unless called by the other party for purposes unconnected with his original testimony, and even when he is afterwards called by the other party, he is still regarded, it is said, as the witness of the party first producing him. (1 Wharton on Evidence, sec. 549.) The case, therefore, does not come within the reason of the rule as laid down in section 2049 of the Code of Civil Procedure. Nor does it come within its language, if the term “production,” there used, be understood as referring to the first introduction of the witness; and as this construction best accords with the reason of the rule, and the rule itself as previously existing, the provision should be so construed. It was therefore error to exclude the testimony offered.

We advise that the judgment and order appealed from be reversed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

[Sac. No. 654. In Bank.—December 3, 1901.]

D. C. POOL et al., Respondents, v. PARMELIA SIMMONS
et al., Appellants.

FERRY FRANCHISE—RIVER BETWEEN COUNTIES—SALE TO HIGHEST BIDDER NOT REQUIRED—APPLICATION OF STATUTE.—The act of 1893 (Stats. 1893, p. 288) requiring the sale of franchises to the highest bidder does not apply to a franchise for a ferry over a river between two counties; but such franchise is regulated by sections 2843 et seq. of the Political Code, the provisions of which are not repealed, either expressly or by implication, by the act of 1893.

ID.—STATUTORY CONSTRUCTION—DEPARTURE FROM LITERAL IMPORT.—Where it is evidence from the whole tenor of a statute, and from acts *in pari materia*, that the legislature could not have intended the consequences of a literal construction of its language, and such construction would lead to great inconvenience, if not to an absurdity, the literal construction will not be followed.

ID.—REPEAL OF CODE PROVISIONS—IMPLICATION NOT FAVORED.—Repeals by implication are not favored; and a subsequent act will not repeal prior code provisions by implication, where force and effect can be given to both.

ID.—ACTION TO CONDEMN LAND FOR FERRY—EVIDENCE—PUBLIC USE—DETERMINATION OF SUPERVISORS CONCLUSIVE.—In an action to condemn land for a ferry-landing, under a franchise over a river between two counties, granted by the board of supervisors of the proper county, testimony for the defendants, to show that the ferry was not a public use, is not admissible. The determination by the board, upon evidence adduced before it, that the ferry was a public necessity, is conclusive in such action.

ID.—NOTICE OF HEARING OF APPLICATION—AFFIDAVIT OF PUBLICATION—PRINCIPAL CLERK.—An affidavit of publication of the notice of hearing of the application for the franchise was properly made by the principal clerk, who is shown by the affidavit to have charge of all the advertisements in the paper.

ID.—CONTEST OF APPLICATION—LOCATION OF FERRY—DETERMINATION OF BOARD—EVIDENCE.—Where it appears that the defendants appeared before the board and contested the application for the ferry franchise, and had a full hearing after notice given, the questions as to whether the location of the ferry by the board would best subserve the use of the public and be least injurious to the defendants, were for the determination of the board upon such hearing, and evidence thereupon is not admissible for the defendants in an action to condemn their land for the ferry.

ID.—VENUE OF ACTION—RIGHT OF CONDEMNATION.—The action to condemn the land was properly brought in the county in which the land was situated; and the grant of the ferry franchise, properly

made to the plaintiffs by the board of supervisors of the other county as provided by law, gave to them the right to maintain the action.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. E. E. Gaddis, Judge.

The facts are stated in the opinion of the court.

Clark & Gill, and R. Clark, for Appellants.

W. H. Grant, for Respondents.

VAN DYKE, J.—The action is to condemn a strip of land for a ferry-landing, 60 x 145 feet, on the west bank of the Sacramento River, in Yolo County. Judgment went for the plaintiffs, from which and an order denying a motion for a new trial defendant appealed.

1. It is contended on the part of the appellants that the complaint fails to show that the plaintiffs were the owners and holders of a franchise to erect and construct a ferry, and hence fails to state facts sufficient to constitute a cause of action. This claim is based upon the fact that the complaint does not show that the franchise in question was sold to the highest bidder under the act of 1893 entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises." (Stats, 1893, p. 288.) The act in question, by a literal reading, might perhaps be broad enough to include a franchise like the one in question, but to give a construction to the act so as to include a franchise for a ferry over a river between two counties, would lead to great inconvenience, if not to an absurdity. The franchise in this case was for a ferry on the Sacramento River, between the counties of Yolo and Sutter, and was granted under the provisions of the Political Code on that subject. (Pol. Code, secs. 2843 et seq.) It is provided in the Political Code that in such case the application must be made to the board of supervisors of the county on the left bank of the river descending; that the board must fix the bond to be given by the corporation or person taking tolls, and provide for the annual renewal thereof; fix the amount of license tax to be paid per month, payable annually, and fix the rate of toll, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the ferry for the first year, nor on the fair

cash value, together with the repairs and maintenance for any succeeding year; and make all necessary orders and rules relative to the construction and business thereof. The license tax must not exceed ten per cent of tolls annually collected. The board, in fixing the license tax and rate of tolls, must make inquiry into the present actual cash value and cost of all necessary repairs and maintenance, and in all estimates of the fair cash value of the ferry the value of the franchise must not be taken into consideration. The bond to be given must be conditioned that the ferry will be kept in repair, and that the keeper will faithfully comply with the laws of the state and all legal orders made by the board, and pay all damages by reason of any delay at and defect in such ferry. The license tax must be paid to the treasurer of the county granting it, and one half thereof repaid to the treasurer of the county in which the other end of the ferry is located. The owner of the land on the left bank of the river descending is entitled to preference over the owner on the right bank, in procuring authority to construct a ferry. The board, in hearing the application, is vested with the authority to determine whether or not the applicant is a suitable person, and among the rules and regulations it may prescribe the number of boats to be kept, their character, and how propelled; the number of hands employed; the number of trips to be made daily, or whether trips shall be made in the night-time; who may be ferried free of tolls; in case of steamboats, rate of speed; and penalty for violation of rules and regulations. It will be readily seen that many of these provisions are entirely inconsistent with the theory that the franchise should be sold to the highest bidder, as provided by the act of 1893. In case the franchise should be sold to the highest bidder, which board of supervisors should sell the same? and would the sale by the board of either county convey any franchise in the other county? and in case each county should sell to different bidders, which one would be entitled to the franchise? Again, a sale to the highest bidder is inconsistent with the provision giving preference to the owner on the left bank of the stream, and the board would have no right to require a bond if the highest bidder is entitled to the franchise. Neither would it exercise its discretion as to whether the applicant was a suitable person. The bidder might have to pay a large sum for the franchise, and the amount so paid could not be considered by the board in

fixing the rate of toll. The whole policy of the law, as shown in the Political Code, is to allow franchises like this to be granted by the board to a suitable person, to subserve a public benefit, subject to rules and regulations, and that the license required to be paid, as fixed by the board, is to be full compensation to the counties, and to be divided between them. It was evidently considered that such a ferry was a public necessity, and should be subject to the control of the local board for the benefit of the public, to be constructed by a private party, to be compensated in tolls. The reason and spirit of the act of 1893 does not apply to a case of this kind, any more than it did apply to a case of a steam-railroad passing through a town or city, as held in *People v. Craycroft*, 111 Cal. 544. There it was said that although the language of the act of 1893 was broad enough to cover a steam-railroad, and the privilege of laying and operating a steam-railroad through a city, yet at the same time it was perfectly evident by the whole tenor of the act, and other acts *in pari materia*, that the legislature could not have intended the consequences of a literal construction of the language, the court saying, "This law was not intended to apply to such a case, but only to those cases—as of street-railroads—in which *bona fide* competition is possible." The act of 1893 does not, in terms, purport to amend or repeal the code provisions on the subject of ferries, and repeals by implication are not favored. In order for a subsequent act to repeal a former, it should appear from the later act that it was intended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given to both. (*Capron v. Hitchcock*, 98 Cal. 427; *Matter of Yick Wo*, 68 Cal. 304;¹ *Christy v. Board of Supervisors of Sacramento County*, 39 Cal. 10.) It seems to have become apparent that a literal construction of the act of 1893 would cover cases not contemplated, and lead to the absurdities pointed out, and therefore said act was superseded by the passage of another act by the legislature in 1897 (Stats. 1897, p. 135), relating to the same subject. This later act, by its terms, is limited to the sale of street-railroads and other franchises in municipalities, and does not apply to counties, nor to steam-railroads and telegraph lines in municipalities.

2. The court did not err in excluding the testimony of-

¹ 53 Am. Rep. 12.

ferred by defendants for the purpose of showing that the ferry was not a public use. The defendants appeared and contested that question before the board of supervisors granting the franchise. Section 2893 of the Political Code provides that, after a hearing, "if the board finds that the ferry is either a public necessity or convenience, and that the applicant is a suitable person, . . . authority to erect and take tolls on the ferry may be granted to him for the term of twenty years." The board in this case heard the evidence, and determined that the purpose of the proposed ferry was a public necessity, and its determination in this proceeding is conclusive. (*Santa Ana v. Harlin*, 99 Cal. 540; *County of Siskiyou v. Gamlich*, 110 Cal. 98; *Tehama County v. Bryan*, 68 Cal. 63; *County of San Mateo v. Cobscook*, 130 Cal. 631.) The affidavit of the publication of the notice of time and place of hearing the application is claimed to be defective because made by the "principal clerk of the Yolo Democrat." It is said that section 415 of the Code of Civil Procedure requires the affidavit to be made by the "printer, or his foreman or principal clerk." The affidavit in this case substantially complies with the statute. It shows that the party making it had "charge of all the advertisements in said paper." (*Sharp v. Daughey*, 33 Cal. 513; *Waters v. Waters*, 27 N. Y. Supp. 1006; 7 Misc. Rep. 519.) But the record in this case also shows that the defendants appeared before the board and contested the application on its merits.

3. The action was properly brought in Yolo County, that being the county in which the land sought to be condemned is situated. The board of supervisors of Sutter County granted the franchise as provided by law, and by reason of the franchise the plaintiffs had the right to maintain the action. The court properly excluded the offered testimony of defendants for the purpose of proving that the ferry was not located where it would best subserve the use of the public and be least injurious to defendants. These matters were for the determination of the board of supervisors, and the defendants, after notice given, had a hearing before that tribunal. *Pasadena v. Stimson*, 91 Cal. 259, is not in point. That was an action to condemn land for the purpose of a sewer, and the owner of the land sought to be condemned had not had his day in court. There was no provision for preliminary hearing and determination of these questions, as in the case at bar. (*County*

of *Siskiyou v. Gamlich*, 110 Cal. 100.) This disposes of the main assignment of errors on the part of the appellants, necessary to be considered.

Judgment and order affirmed.

McFarland, J., Harrison, J., and Garoutte, J., concurred.

[Crim. No. 731. In Bank.—December 3, 1901.]

In the Matter of W. H. LAMBERT, on Habeas Corpus.

INSANITY LAW—CONSTITUTIONAL LAW—NOTICE PRIOR TO COMMITMENT—DUE PROCESS OF LAW.—The provisions of the act of March 31, 1897, known as the Insanity Law, so far as they purport to authorize the commitment to and retention in an asylum of a person alleged to be insane without giving him prior notice and an opportunity to be heard on the charge against him, lack the essential elements of due process of law, and are unconstitutional.

APPLICATION for a writ of *habeas corpus*.

The facts are stated in the opinion of the court.

R. Clark, for Petitioner.

T. B. Hutchinson, for Respondent.

HARRISON, J.—The petitioner alleges that he is illegally confined in the Napa state hospital and restrained of his liberty by A. M. Gardner, the superintendent thereof, and seeks his discharge. In his return to the writ issued upon the petition, the respondent shows that he holds the petitioner in custody by virtue of an order of commitment issued by the Hon. A. J. Buckles, judge of the superior court for the county of Solano, on November 9, 1899, committing said Lambert to the Napa state hospital as an insane person, and a proper subject for custody and treatment in an institution for the insane; and sets forth in his return a copy of the order of commitment, together with copies of the petition therefor, and of the certificate of lunacy accompanying the same, which were delivered to him at the same time that the petitioner was delivered at the hospital;

and averring that the petitioner is still insane, and not competent to be discharged. The sufficiency of this return is controverted by the petitioner upon the ground that the act of March 31, 1897 (Stats. 1897, p. 311), known as the Insanity Law, under which the proceedings for his commitment were had, is unconstitutional, in that he is thereby deprived of his liberty without due process of law; that the proceedings thereunder are insufficient to authorize his commitment, and that upon the application therefor the judge of the superior court had no jurisdiction or authority to make that order, and that the said order, together with the documents accompanying the same, do not justify his detention or confinement.

The aforesaid act of 1897 purports to be a complete revision of the laws of this state on the subject of insanity, and provision is made therein for the organization of a state commission in lunacy, and the management of the several institutions for the insane, and the mode is prescribed by which patients are to be admitted to the several state hospitals, or otherwise cared for. The provisions authorizing the commitment of a person to a hospital are found in section 3 of article III of the act. An application for the commitment is to be made to the judge of the superior court of the county, by a relative or friend of the alleged insane person, or by any one of certain designated officials, and is to be accompanied by a certificate of lunacy, for which provision is made in the preceding section. This certificate is to be signed by two of the medical examiners authorized by that section, and must show that it is their opinion that the alleged insane person is actually insane, and "shall contain the facts and circumstances upon which their opinion is based, and show that the condition of the person examined is such as to require care and treatment in a hospital for the care, custody, and treatment of the insane." Upon its presentation to the judge with an application for the order of commitment, that officer is authorized forthwith to determine the question of the insanity of the person, and to immediately issue an order for his commitment to one of the state hospitals. The sheriff is to be immediately notified thereof, and is at once to make provision for his transfer to such hospital. Upon his delivery of the person to the hospital, he shall at the same time deliver to the superintendent the application for the commitment, the certificate of lunacy, and the order of commitment, as

the authority of that officer for the detention of such person.

An examination of the foregoing provisions of the statute shows that there is no provision for giving to the alleged insane person any notice of the proceedings against him, and that, under its provisions, the first intimation that he may have thereof may be when the sheriff takes him into his custody under the order of commitment. The person making the application for the commitment is not required to give him any notice thereof, nor is there any requirement that he shall be informed of the object for which the physicians are examining him. The direction that the application for the commitment shall be "accompanied" by a certificate of lunacy not only clearly indicates that the certificate shall have been made before the application is presented to the judge, but it also implies that it may be made at the mere request of the person who is seeking the commitment. This certificate may be made by any two physicians who have received and filed the certificate of a superior judge showing that they possess the requisite qualification. There is no limit to the number of physicians who may become such medical examiners, nor does the act authorize a superior judge to refuse his certificate to any physician who may show himself qualified therefor. No certificate is to be made unless two examiners shall find the person to be insane, but the person seeking the order of commitment is not concluded by the determination of the first examiners to whom he may apply, but is at liberty to continue his application for a certificate until he shall find two examiners who will certify to the insanity of the person. The examination is not made by them under any direction of the judge, nor do they receive any letter of authority or power to compel testimony. The statute does not require that their certificate shall be given under oath, nor does it require that the witnesses before the examiners shall give their testimony under oath, or provide for any oath to be administered to such witnesses. They are only required to make "such examination" of the person as will enable them to form an opinion "as to his sanity or insanity," and their examination may in fact be so conducted that he will have no knowledge that they are examining him for that purpose, or even making any examination of him, and if after such examination they conclude that he is insane, they are to jointly so certify.

Upon the presentation to the judge of the certificate and application for the order of commitment, he is authorized "to proceed forthwith to determine the question of insanity." The statute does not require the judge, when he passes upon their sufficiency, to give any notice thereof to the alleged insane person, or even to require him to be brought into his presence. As the judge to whom the application is made has no notice of the proceedings until after the examination has been had and the certificate has been made, there is no opportunity prior thereto for him to direct any notice to be given. The provision in section 8 for the arrest of an insane person who is shown to be dangerous to person or property, is the only instance provided in the statute for any preliminary notice of a hearing, and the facts prescribed in that section for such notice have no existence in the present case. The provision that "upon the demand of any relative or near friend in behalf of such alleged insane person, the judge shall, or he may upon his own motion, order a hearing of the application," is no restriction upon his authority to proceed without giving any notice, since the whole proceeding may be conducted without the knowledge of any relative or friend of said alleged insane person, and if the application for his commitment is made by a relative or friend who has procured the certificate of lunacy from two medical examiners, such relative or friend would not be likely to demand any further hearing. There is also a provision in the act, that if the application is made by any other person than a relative or friend, notice thereof shall be served upon one of certain designated relatives; but if, as in the present case, the application is by a relative or friend, the statute does not require any notice thereof to be given, either to the person alleged to be insane, or to any other friend or relative of his. The provision in section 4 for a trial upon the question of his insanity is effective only after the order of commitment has been made, under which the person may have been immediately placed in the hospital, and cannot be made a substitute for his right to have an opportunity to be heard and to defend himself against the charge before being deprived of his liberty. For the purpose of showing the inefficiency of this provision in protecting a person against an invasion of his constitutional right to a notice and a hearing before he can be deprived of his liberty, it is only necessary to read in connection there-

with the provision that before such trial can be had he must provide for the payment of the costs thereof, and also the provision of section 8 in article I of the act, that after he has been committed to the hospital, he may be restrained of all correspondence with the outer world, except with the superior judge and the district attorney of the county from which he was committed.

The statute thus clearly provides that the proceedings before the judge in a case like the present may be entirely *ex parte*, and that he may be satisfied that the alleged insane person is insane by merely examining the certificate and petition. He may issue the order of commitment upon the opinion of the two examiners, without any examination by himself of the person sought to be committed, or of the examiners who have made the certificate, and without any knowledge of the facts or testimony upon which they have made their certificate. In thus acting upon these documents, he takes as the sole basis of his action the opinion of the examiners, ascertained as before shown, that the individual is insane. The opinion of practitioners of medicine, however, upon the question of insanity are not always uniform or infallible, especially if such opinion is formed *ex parte*, or without an opportunity for a full investigation of the charge. The mere certificate of an opinion thus obtained ought not to be a sufficient warrant for an order for the confinement of a person in an insane asylum. There should, at least, be the semblance of a judicial investigation of which a public record can be preserved, before a person can be deprived of his liberty.

In making this order of commitment, the judge is not, however, in the exercise of any of the judicial authority of the state which the constitution has vested in the superior court, but exercises merely a statutory authority which has been conferred upon him by the Insanity Law. No step in the proceeding is taken by a court, nor does the statute require the application for the order or the certificate of the examiners, or the order of commitment, to be filed in any court, or made a matter of judicial record, or become a matter in any respect public, except such as results from their delivery to the superintendent of the hospital, as his authority for receiving and detaining the alleged insane person. In the exercise of such statutory authority, there is no presumption in favor of its validity, but, as in the case of any process issued by a tribunal or officer whose authority is special and

limited by statute, it is essential that the facts upon which depends his right to exercise such authority, or issue such process, shall not only exist, but shall be also set forth in the document by virtue of which the person is to be deprived of his liberty or estate.

It appears from the return in the present case that the application for the order of commitment was made by a person purporting to be a friend of the petitioner, and that it was presented to the judge of the superior court, November 9, 1899, and that upon the same day the order of commitment was made, and the petitioner delivered to the superintendent of the Napa state hospital. A certificate of two medical examiners, as provided by the act, dated November 9, 1899, was delivered to the superintendent at the same time with the order of commitment. This certificate is appended to a "statement of facts" setting forth many items in the history of the alleged insane person. It is evident from a mere inspection of this statement of facts that it was derived from others, but it does not appear whether it was prepared under the direction of the examiners after their examination of witnesses in reference thereto, or had been previously prepared and was submitted to them at the time they were requested to examine the petitioner. Neither does it appear whether the "facts" in the statement were obtained from the examination of witnesses, or accepted from mere rumor. The statement is not signed by any one, or in any way authenticated by the examiners, nor are the names of the persons from whom the facts were obtained given. The certificate itself does not give the names of the persons who were examined, nor does it contain the name of the petitioner, or state that they ever examined the petitioner, or that in their opinion he is insane,—the blank space for the name of the person examined not having been filled with the name of any one. It is only by inference from the accompanying documents that the certificate can be held to have any application to the petitioner.

It does not appear, either from the order of commitment or by the accompanying documents, that any notice was given to the petitioner of an intention to make an application for the order, or that he was ever notified or had any knowledge that the medical examiners would make any examination or investigation in reference to his insanity, or that the judge of the superior court ever directed any notice to be

given him of the application, or of an intention to determine the question of his insanity; nor does it appear that he was present at the time the matter was under consideration by the judge, or was at any time seen or examined by the judge.

The act in question was evidently suggested by the Insanity Law of New York, passed in 1896 (1 N. Y. Laws 1896, chap. 545), and the provisions of that act have been closely copied. The New York statute, however, contains many provisions and safeguards for the individual, which are not contained in the law of this state. Section 62 of the New York statute, which corresponds to section 3 of article III of the California statute, provides that "notice of such application [for the order of commitment] shall be served personally, at least one day before making such application, upon the person alleged to be insane,"—a provision which is wholly omitted in the statute of this state. The section also provides that the judge may dispense with personal service, or may direct substituted service to be made upon some person to be designated by him, but that in such case he shall state, in a certificate to be attached to the petition for the commitment, his reasons for dispensing with personal service of such notice, and if substituted service is directed, the name of the person to be served therewith. In *People v. Wendel*, 33 Misc. Rep. 496, 68 N. Y. Supp. 948, the relator had been committed to an insane asylum under the provisions of this section, but had had no notice of the application, either personally or by substituted service on any one in her behalf, and there was no hearing at which she was either personally present or represented by any person. The court held that, to the extent that the Insanity Law authorized such proceeding, it was in violation of the constitution, in that it deprived her of her liberty without due process of law, and ordered her release.

An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given. Under the laws of this state, a guardian of the person or the estate of an insane person cannot be appointed without giving him notice of the application therefor (Code Civ. Proc., sec. 1763); nor can a judgment for so small a sum as five dollars be rendered against him unless he has been served with a sum-

mons in the action. (Code Civ. Proc., sec. 411.) Much more is there reason for giving him notice of an application to deprive him of his personal liberty. The provision in the statute for a notice to a relative or friend of the alleged insane person cannot be made the equivalent of a notice to the person himself. Neither can the provision that upon the application for a commitment a hearing may be had upon the demand of any relative or near friend in behalf of the alleged insane person, or upon the motion of the judge himself, be considered as due process of law. What constitutes due process of law may not be readily formulated in a definition of universal application, but it includes, in all cases, the right of the person to such notice of the claim as is appropriate to the proceedings and adapted to the nature of the case, and the right to be heard before any order or judgment in the proceedings can be made by which he will be deprived of his life, liberty, or property. The constitutional guaranty that he shall not be deprived of his liberty without due process of law is violated whenever such judgment is had without giving him an opportunity to be heard in defense of the charge, and upon such hearing to offer evidence in support of his defense. If his right to a hearing depends upon the will or caprice of others, or upon the discretion or will of the judge who is to make a decision upon the issue, he is not protected in his constitutional rights. (*Underwood v. People*, 32 Mich. 1.¹) To say that if he is in fact insane, therefore any notice to him would be vain, is to beg the very question whose determination underlies the right of the state to deprive him of his liberty. The fact of his insanity is to be determined before his right to his liberty can be violated. If that question is determined against him, without any notice or opportunity to be heard, or to introduce evidence in his behalf, and under such determination he is confined in the hospital, his constitutional guaranty is violated.

The case before us does not involve the right of the state to provide for the summary arrest of a person against whom a charge of insanity is made, and his temporary detention until the truth of the charge can be investigated. Such arrest would itself be a notice to him of the charge, under which he would be afforded an opportunity for a hearing thereon. Nor is there involved the right of the state to

¹ 20 Am. Rep. 633.

permanently restrain an insane person of his liberty, whether such person be harmless or dangerous, but the question is, whether he is entitled to a judicial investigation of the charge that he is insane, and the right to be heard thereon before its determination. The question to be determined is, not whether the action of the judge in investigating the insanity of the petitioner was conducted under the forms of law, and with proper regard for his rights, but whether the judge had the right to enter upon the investigation, or take any action whatever in reference to his insanity. In the absence from the statute of any requirement of notice to the person, any notice that might be given him would be without legal force and authority, and consequently, whether acted upon by him or disregarded, the proceeding would be equally ineffective. "It is not enough that he may by chance have notice, or that he may as a matter of favor have a hearing. The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done." (*Stuart v. Palmer*, 74 N. Y. 188.¹) "It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement." (*Bennett v. Davis*, 90 Me. 105.)

The following authorities may be referred to in support of the foregoing views: *Underwood v. People*, 32 Mich. 1;² *Petition of Doyle*, 16 R. I. 537;³ *State v. Billings*, 55 Minn. 467;⁴ *Portland v. Bangor*, 65 Me. 120;⁵ *Bennett v. Davis*, 90 Me. 102; *People v. St. Saviour's Sanitarium*, 34 Hun (App. Div.) 363. In the case last cited the question was quite fully considered by the general term of the supreme court of New York. The relator had been committed to an asylum for inebriates for the term of one year, under a provision of a statute of that state authorizing such commitment to be made by any judge of a court of record, upon a certificate in writing, signed by two physicians, containing statements bringing the person within the description

¹ 30 Am. Rep. 291.

² 20 Am. Rep. 633.

³ 27 Am. St. Rep. 759.

⁴ 43 Am. St. Rep. 525.

⁵ 20 Am. Rep. 681.

named in the statute. It was held that as the order had been made without any notice to the relator, and without her presence, she was deprived of her liberty without due process of law, and that the commitment was void, the court very tersely and aptly phrasing the principle underlying its decision as follows: "No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offense against the law, or to protect a person from himself, or the community from apprehended acts, such restraint cannot be made permanent or of long continuance, unless by due process of law."

Under the foregoing considerations, it must be held that the Insanity Law of 1897, to the extent that it authorizes the confinement of a person in an insane asylum without giving him notice and an opportunity to be heard upon the charge against him, is unconstitutional, and that the proceedings by virtue of which the petitioner is held by the respondent are invalid.

It is ordered that the petitioner be released from the asylum.

Temple, J., Beatty, C. J., and Henshaw, J., concurred.

GAROUTTE, J., dissenting.—As I read the foregoing opinion, it renders entirely void the present lunacy law. It is hardly necessary to say that such grave results should be avoided if possible, and that no technical construction of this law should be invoked which leads to such serious consequences. I believe a fair, liberal construction of the law may be had, which will support its constitutionality, and for that reason I dissent from the opinion of the court bearing upon that branch of the case. If time be allowed hereafter, I shall present my reasons for this dissent in detail.

[L. A. No. 633. Department Two.—December 3, 1901.]

J. W. KISHLAR, Appellant, v. THE SOUTHERN PACIFIC RAILROAD COMPANY, Respondent.

ACTION FOR DAMAGE TO LEASEHOLD—EVIDENCE—INTEREST ON MONEY—

HARMLESS RULING—MARKET VALUE OF LEASE—INSTRUCTION.—In an action to recover damages for injury to the plaintiff's leasehold, from the construction of a railroad track, impeding plaintiff's ingress and egress, evidence elicited on the cross-examination of the plaintiff as to what he paid for interest on borrowed money was not admissible as tending to show the rental value of the land; but whether it was admissible on general cross-examination or not, the ruling admitting it was harmless, where the plaintiff testified fully as to the value of the land, and what he paid as rental therefor, and as to the market value of the lease regardless of rental, and where the court instructed the jury that the measure of damages was the market value of the lease.

ID.—ALLEGED INJURY FROM TRACK IN ALLEY—TRACKS ON OPPOSITE LAND OF DEFENDANT—EVIDENCE—INSTRUCTION.—Where the injury complained of was alleged to have resulted from a railroad track constructed in an alley adjoining the leased property, and there was no averment or offered proof to show that the defendant negligently managed other parallel tracks situated on its own land across the alley, it was proper for the court to exclude evidence as to the number of cars run upon those tracks, and to instruct the jury that the use of the tracks upon the defendant's private land parallel with and contiguous to the alley, by running trains or leaving cars standing thereon, was not an element of damage in the action.

ID.—TIME AND MANNER OF ESTIMATING VALUE OF LEASE—VALUE IN USE TO PLAINTIFF.—It was proper for the court to instruct the jury that they were to estimate the value of the lease at the time when the track complained of was first completed and operated, and that the market value of the lease was not its value in use to the plaintiff for a particular purpose, but only its fair market value.

ID.—AVAILABILITY FOR PARTICULAR USE—MARKET VALUE.—The availability of the property for any particular use may be shown; but where all the facts bearing on the use for which the property was adapted and for which it is used are shown, the question to be considered is, what value in the market could be obtained, if the plaintiff wished to sell his property, from parties who wished to buy and would give its fair value.

ID.—COSTS, WHEN NOT RECOVERABLE—STRIKING OUT COST-BILL.—In an action for damages, where the plaintiff recovers less than three hundred dollars, he is not entitled to recover his costs, and it is

proper in such case for the court to strike out plaintiff's memorandum of costs.

ID.—PRACTICE—FILING NOTICE OF MOTION TO TAX COSTS—COMPLIANCE WITH STATUTE.—The practice, in this state, of filing within five days after notice of the bill of costs, a notice of motion to tax the costs, and on the day designated in the notice, or the day to which the hearing is postponed, calling up the motion *viva voce*, instead of filing a formal written motion in the first instance, is a sufficient compliance with the statute requiring the motion to be made within the five days.

APPEAL from a judgment of the Superior Court of Riverside County and from an order denying a new trial and from an order striking out a cost-bill. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

Collier & Evans, for Appellant.

Purington & Adair, W. A. Purington, J. E. Foulds, and Foshay Walker, for Respondent.

THE COURT.—Action for damages. The cause was tried before a jury, and the verdict was for plaintiff. He appeals from the judgment, from the order denying new trial, and from the judgment disallowing him his costs. Plaintiff was the owner of a leasehold interest in a certain lot in White's Addition to Riverside, the lease being for three years from November 13, 1895, with privilege of renewal at same rental for two years. The lot was 25 feet wide and 120 feet long, entirely occupied by a warehouse. Pachappa Avenue bounded the lot on the west, and was occupied by the tracks of the Santa Fe Railroad Company, so close to the building as to preclude the loading and unloading of teams at that end of the building, and it was used only to receive and discharge freight by rail. The east end of the warehouse fronted on an alley, through which alone plaintiff could receive and discharge freight by wagons. He was engaged in selling fertilizers, and it was necessary to his business that he should have unobstructed ingress and egress to and from his warehouse by this alley. On June 19th, defendant, without plaintiff's consent, but under license of the city authorities, duly given by ordinance, built its track through this alley, necessarily so near to plaintiff's building as to render it no longer of use to him, and he was compelled to vacate it, and

it stood idle from about July 1, 1896, to April 16, 1897, when he surrendered the lease to the lessor.

1. Plaintiff was a witness in his own behalf. He had testified quite fully and specifically to the injury to his leasehold by the track in the alley, and had fixed the amount of the damage. He had testified, on cross-examination, to the value of the lot; also, what he paid as rental, and what the market value of the rental was, regardless of what he paid. He was further asked the market value of money in June, 1896, or about that time. The question was objected to by plaintiff as immaterial, irrelevant, and incompetent; the objection was overruled, and plaintiff excepted, and now urges the ruling as error. The witness answered, stating what interest he paid on borrowed money at that time. This evidence as to the rate of interest on the money was not admissible as tending to show the rental value of the land. Whether or not it was admissible on cross-examination to test the general knowledge of the witness as to business and values, need not be determined, for we think it could not have been prejudicial to appellant. The witness testified directly to the value of the land and the value of his lease, and the court instructed the jury that the measure of damages was the market value of the lease,—what, upon the evidence, it would bring if the plaintiff desired to sell, and a purchaser desired to buy and paid a fair price for it; and in view of this condition of the case, the error, if it was an error, was without injury.

2. It appeared that defendant owned the land across the alley, opposite plaintiff's property, and had constructed tracks over this property parallel to the alley, one of which was near the alley, though on defendant's own land. The witness Pitman, cashier of defendant company, called by defendant, testified to the location and operation of the track in the alley, and also of the tracks of defendant across the alley, on its own lands, and that the use made of them was chiefly for shipping oranges. He was asked, substantially, how many cars each day the defendant was in the habit of running on the tracks which it had constructed on its own land. Defendant objected to the question as immaterial and irrelevant, claiming that "the question should be confined to the number of cars run over the road abutting on the Kishlar property, not on other roads." The objection was sustained, and plaintiff excepted. Upon this subject the court instructed the jury as follows: "That the use of the

tracks upon the private land of defendants, parallel with and contiguous to said alley, by defendant's running engine and trains thereon, or leaving cars standing thereon, is not an element of damage in this action." The rulings as to the evidence, and the instruction, are assigned as errors. There was no averment or offered proof that the defendant was guilty of any negligence in the management of its tracks on its own private land, and its ordinary use of those tracks, constructed on its own private land for its business purposes, constituted no legal damage to the plaintiff. We think, therefore, that the ruling and instruction of the court complained of were not erroneous.

3. In the instruction marked IX the court, among other things, told the jury that they were to estimate the value of the lease on the nineteenth day of June, 1896 (when the track was completed and operated), and that "the market value is not the value in use to the plaintiff for a particular purpose, . . . but only the fair market value of plaintiff's property." Plaintiff concedes in his brief "that market value is not necessarily the use to the plaintiff for a particular purpose," but he claims that "this use to the plaintiff for a particular purpose is a very proper element to be considered by the jury, . . . and should not be taken from the jury in arriving at market value." (Citing *San Diego Land etc. Co. v. Neale*, 88 Cal. 50.) In *Santa Ana v. Harlin*, 99 Cal. 538, which was a proceeding to condemn land, the court said: "The present market value of the land is the measure of damages, and not its value in use to the owner or to the parties seeking to condemn." There is nothing in the *Neale* case, *supra*, indicating a different rule. The availability of the property for any particular use may be shown, and in the present case all the facts bearing on the use to which the building was adapted and for which it was being used were shown. In *Lawrence v. City of Boston*, 119 Mass. 126, which involved the value of a leasehold interest in property sought to be condemned for a public building, the trial court, in charging the jury, said: "The value of the leases is their market value. . . . The fact, therefore, that one of these lessees, Lawrence, as has been argued by his counsel, did not want to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of market value, because it is not a case of one who wants to sell and one who wants to buy. If Lawrence had wanted to go out, the question is,

What would his lease have brought? not what it would have been worth to him if he had wanted to stay there, because it may have been of greater value or less value to him than its value upon the market. That simply determines its value to him, not its market value. The question for you to consider is, If Lawrence wanted to sell this lease, what could he have obtained for it upon the market, from parties who wanted to buy and would give its fair value?" Gray, C. J., said: "The instructions were such as have been usually given in similar cases, and were correct."

There was no error in the instruction given.

4. It is contended that the court erred in its order striking out plaintiff's memorandum of costs. The amount claimed in the bill of costs was \$95.40. The judgment was entered on the verdict, May 7, 1898. The cost-bill was served on May 9, 1898, and on the same day defendant served written notice that on May 16th defendant would move the court to tax the costs in the action. The parties appeared on the 16th and defendant presented the motion, and, after hearing, the court ordered that the memorandum be stricken out. This was not error. The action was for damages, and as the plaintiff recovered less than three hundred dollars, he was not entitled to recover his costs of the respondent.

It is claimed that defendant's motion came too late, and that serving the written notice of the motion was not sufficient, but that the motion itself should have been filed within five days after the notice of the bill of costs. (Code Civ. Proc., sec. 1033.)

The universal practice in this state has been to serve and file written notice of the motion to tax the cost-bill as the equivalent of filing a motion, within five days, and on the day designated in the notice, or the day to which the hearing shall have been postponed, to call up the notice and make the motion *viva voce*, a note of the motion being made by the clerk on his minutes. We think this practice is sufficient compliance with the statute. The order denying motion for new trial and the order striking out the cost-bill are affirmed.

[S. F. No. 968. In Bank.—December 4, 1901.]

W. S. CHAPMAN, Appellant, v. THOMAS E. HUGHES et al., Respondents, and E. W. CHAPMAN, Appellant.

TRUST—TRANSFER BY TRUSTEE—GOOD FAITH OF PURCHASER—FINDING AGAINST EVIDENCE—CONSIDERATION—PRIVATE DEBT—NOTICE—AGENCY.—A finding that a transfer of trust property by a trustee to his daughter-in-law was made to her as a *bona fide* purchaser for value, without notice of the trust, or of the rights of the plaintiff as a beneficiary, is against evidence, where proof of the consideration was not satisfactory, and the evidence in part showed a deed of gift, and in part that there was some settlement of a private debt of a firm, which consisted of the trustee and his son, the husband of the grantee, and it appeared that the husband acted as her agent in the transaction. The full knowledge of her agent, acting within the scope of his authority, charged her with notice of the invalidity of the conveyance, which was void, both as being in contravention of the trust, and also as having been made in payment of a private debt of the trustee. Such deed was voidable as to her, as one taking with notice, at the instance of the *cestui que trust*.

ID.—ESTOPPEL IN PARS—CONSENT OF CESTUI QUE TRUST—PLEADING—FINDING.—If the *cestui que trust* knew of and assented to the conveyance from the trustee to his daughter-in-law, an estoppel *in pars* would be raised against him, and he would not be heard to disavow an act to which he had formally assented, where the parties changed their condition upon the assurance of his consent. But such estoppel *in pars*, to be available, must be pleaded, proved, and found, and cannot be considered in the absence of a pleading and finding to support it.

ID.—SUIT IN EQUITY BY BENEFICIARY—ACCOUNTING—AVOIDANCE OF TRANSFERS BY TRUSTEE—AUGMENTATION OF TRUST FUND.—In a suit in equity, brought by a beneficiary having an interest in trust property, for an accounting against his trustee, and to avoid transfers made by the trustee of the trust property to other parties made defendants, all transfers thereof made by the trustee to any of the co-defendants without consideration, or to persons taking with notice of the plaintiff's rights under the trust, must go to augment the trust fund, to abide an equitable adjustment of rights as between the plaintiff and his trustee, upon the accounting between them.

ID.—TRANSFER AS COLLATERAL SECURITY—PROTECTION OF TRANSFEREE—RESIDUE SUBJECT TO TRUST.—Where a transfer of property by the trustee, as collateral security for indebtedness, is protected, and cannot be assailed *in toto*, the residue of the property remaining after the debt is paid must go into the trust fund.

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- ID.—TRANSFER OF NOTES AND MORTGAGES—GOOD FAITH OF ASSIGNEES—NOTICE—ATTORNEY OF TRUSTEE—SUBSEQUENT EMPLOYMENT BY ASSIGNEE.**—Where securities, consisting of notes and mortgages, were transferred for value by the trustee to purchasers who took without actual notice of the trust, such purchasers are not chargeable with notice by reason of the knowledge acquired by an attorney, who acted solely as attorney of the trustee in relation to the transfer, though such attorney was afterwards employed by a bank which became a second assignee of the securities for value, without knowledge of the trust.
- ID.—TRANSFER FOR LESS THAN FACE VALUE—ACTUAL VALUE NOT SHOWN.**—The fact that securities of the face value of thirty-one thousand dollars were transferred by the trustee for a cash value of twenty thousand dollars is not indicative of fraud or want of good faith in the transaction, where there is no evidence tending to show the actual value of the securities.
- ID.—FINDING AGAINST ADMISSION OF PLEADINGS.**—Where the pleadings admitted that the trustee had made certain conveyances to his wife, a finding contrary to such admission, that he had made no such conveyances, must be set aside.
- ID.—CONTRACTS OF PLAINTIFF AND THIRD PARTY WITH TRUSTEE—SET-OFF—ACCOUNTING—EVIDENCE—FORMER ADJUDICATION—SUPERSEDED CONTRACT—COLLATERAL FINDINGS.**—Where the plaintiff sought an accounting under a contract with the trustee to divide with the plaintiff the net proceeds of lands purchased in the trustee's name, after repaying the purchase-money from sales thereof, and to divide the residue of the lands, and it appeared that plaintiff also agreed that the indebtedness of a third party to the trustee remaining due after an accounting under a deed of trust should be offset against the plaintiff, the rights of the parties to an equitable accounting and set-off, according to the facts upon competent evidence, are not concluded by a former decree, in an action by the plaintiff and such third party against the trustee as an alleged partner, for an accounting under a former syndicate agreement, in which the defendant pleaded and the court found that the syndicate agreement was canceled and superseded without performance thereof by such trust deed, and by an agreement with the plaintiff. Collateral findings in the former action, that the trust deed was modified as alleged by the defendant, are not conclusive; and such former decree is not admissible in evidence against the plaintiff and such third party.
- ID.—ESTOPPEL BY VERDICT OR JUDGMENT—IMMATERIAL AND COLLATERAL ISSUES.**—While a general verdict or judgment operates as an estoppel as to such matters as were necessarily considered and determined, it is never conclusive upon immaterial or collateral issues.
- ID.—RIGHTS OF BENEFICIARY—ACCOUNTING OF TRUSTEE FOR VALUE—INSOLVENCY—FINDING—ENFORCEMENT OF TRUST.**—The beneficiary is not concluded by a finding of the court against an allegation of the insolvency of the trustee, who offered to account for the value of the lands disposed of; and, without regard to the benefits or injuries,

which may follow, the beneficiary is entitled to enforce the trust agreement to the letter, and to avoid every disposition of lands contrary thereto, of which the vendee had knowledge or notice.

ID.—MONEY JUDGMENT—ESTOPPEL.—The beneficiary cannot be compelled to accept a money judgment awarded against the trustee, and is not estopped thereby to recover property wrongfully disposed of by the trustee.

ID.—EXCHANGE OF PROPERTIES BY TRUSTEE EMPOWERED TO SELL—CHARGE OF CASH TO TRUSTEE—AVOIDANCE OF EXCHANGE.—The power of the trustee to sell does not include a power to exchange the trust property for other lands, and where such exchange was effected with one who had knowledge of the terms of the contract between the trustee and the plaintiff, the plaintiff, as beneficiary, is entitled to avoid the exchange, notwithstanding the trustee charged himself with cash on account thereof.

ID.—CONVEYANCES BY WAY OF MORTGAGE—VALUABLE CONSIDERATION—PRE-EXISTING DEBT—NOTICE—BURDEN OF PROOF—AGENCY.—Conveyances by the trustee, by way of mortgage, to secure a pre-existing debt for moneys loaned to the trustee, were for a valuable consideration; but the burden resting upon the plaintiff to prove knowledge or notice of his rights is sustained by proof that the agent who acted for the mortgagee in the transaction had such knowledge, which must be imputed as notice to the principal.

ID.—PAYMENT OF PURCHASE-MONEY BY TRUSTEE—RESULTING TRUST—EXPRESS TRUST.—Notwithstanding that the entire purchase-money for the land was paid for by the trustee, and that he had a beneficial ownership therein, and that no trust could have resulted to the plaintiff by operation of law, yet the plaintiff, who is not seeking to enforce a resulting trust, may enforce his rights under an express trust formally declared by an instrument in writing, signed by the trustee.

ID.—ASSUMPTION OF MORTGAGE BY TRUSTEE—PART PAYMENT—ACCOUNTING—REIMBURSEMENT.—Where, by the agreement between the parties, the trustee was to discharge a mortgage, upon payment of which he was entitled to reimbursement from the proceeds of sales of the property, if only part of the mortgage was paid, if he should be charged in the accounting with the residue, provision must also be made therein for reimbursing him.

ID.—CONSOLIDATION OF ACTIONS—SINGLE JUDGMENT—DEFENDANTS NOT IN PRIVITY—REVERSAL UPON APPEAL—NEW TRIAL LIMITED.—Where the record shows the consolidation of several actions which were tried as one, and a single judgment entered, involving the rights of defendants between whom there is no privity or community of interest, where the judgment is reversed and a new trial is granted, a defendant who has established the validity of his purchase from the trustee will not be required to litigate the matter anew, but the new trial will be limited to issues between parties as to whom the judgment was erroneous, and confined to the subject-matter of findings held not sustained by the evidence.

APPEALS from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The record shows the consolidation of three several actions, numbered 4343, 4532, and 5268, in each of which W. S. Chapman was plaintiff and is appellant, and in each of which Thomas E. Hughes was a defendant. In the action numbered 4343, E. W. Chapman is a party defendant and appellant. Other defendants were joined in each of the actions, the most numerous defendants being made such in the action numbered 4343.

Further facts are stated in the opinions of the court.

Garret W. McEnerney, George H. Maxwell, and T. M. Osmont, for Appellants.

Frank H. Short, and Stanton L. Carter, for Estate of Matilda B. Hughes, deceased, Respondent.

George E. Church, for O. J. Woodward et al., Respondents.

L. L. Cory, for Thomas E. Hughes et al., Respondents.

Horace Hawes, for Fresno Loan and Savings Bank, Respondent

Stearns & Elliott, for Madera Canal and Irrigation Company, Respondent.

HENSHAW, J.—In the decision in this case rendered in Bank, April 7, 1900, it was held that the finding of the trial court upholding the deed of conveyance made by Thomas E. Hughes to his daughter-in-law, Matilda B. Hughes, was unsupported, and that the conveyance was void, or, at least, voidable at the instance of the *cestui que trust*, Chapman. A rehearing was granted for further consideration of this single proposition. The finding of the court was, that the deed was made pursuant to a sale by Thomas E. Hughes to Matilda B. Hughes for a valuable consideration, and that at the time of the sale she had no notice of any right, title, or claim of interest of the plaintiff in or to any portion of the land. The two facts thus declared by this finding are,—1. That a valuable consideration was given; 2. That the grantee took without any notice of plaintiff's rights in the property.

1. The evidence as to consideration is to the last degree unsatisfactory. After a most careful reading of all the testimony upon the point, it is impossible to say what consideration Matilda B. Hughes paid for the land. The original record upon the books of Hughes shows that the deed was a gift to his daughter, and his first evidence upon the trial of the case was to this effect. Subsequently, he modified his evidence, and testified that, on thinking it over, he remembered that there was "quite a consideration" for the deed; that his firm was indebted to his daughter-in-law, and that on account of the deed she canceled "some of the indebtedness," and that there was a "kind of a settlement" between them. What indebtedness she canceled, and to what extent, nowhere appears. What kind of a settlement was had, is not disclosed.

2. But, passing this consideration, with the concession that the evidence, though unsatisfactory, is still sufficient to support the finding as to consideration, and turning to the second proposition, namely, that the grantee had no notice of plaintiff's rights, there is not only nothing in the evidence to support this finding, but the direct and positive evidence of the parties interested in upholding this deed is against it. William M. Hughes was the son of Thomas E. Hughes, was his partner in business, and in the particular business touching the sales of these lands, knew all about the condition of the title, and of the contracts and trust existing between plaintiff and his father. He acted for his wife, as her agent, in the matter, or as he phrased it, "the Tillie B. Hughes land was transacted by myself." The full knowledge which the agent thus possessed was knowledge chargeable to the principal in a transaction managed wholly by him and within the scope of his authority, and the situation thus presented is that of a trustee who conveys trust land to one taking with notice, in extinguishment of the private debt of that trustee. Such a conveyance is not only void, as being in contravention of the terms of the trust (Civ. Code, sec. 870), but it is void upon consideration of the general equitable principle that a trustee cannot so sell in payment of his own debt. (*Frink v. Roe*, 70 Cal. 296.) And where the conveyance is made to one taking with notice, it will be voidable at the instance of the *cestui que trust*.

Such is the case here presented. But it is urged that the evidence of the Hugheses is that plaintiff, Chapman, knew of and assented to this conveyance. If this should be proven

and found to be true, doubtless an estoppel *in pais* would be raised against plaintiff, and he would not be heard to disavow the act to which previously he had formally assented, the parties having changed their condition upon the assurance of his consent. But the answer to this is, that such an estoppel should have been pleaded, proved, and found. It was not pleaded, nor is there any finding in the case to support the position.

It is concluded, therefore, that the finding under consideration is unsupported by the evidence, and must fall, and with it must fall the deed to Matilda B. Hughes.

Consolidated in the transcript were appeals from three separate actions which were united and tried together by order of the court. In deciding the action, the court entered separate findings, judgments, and decrees. To the end, therefore, that the record in this case, or in these cases, may be made free from uncertainty, it is ordered that the judgments appealed from be reversed and the cause or causes remanded for further proceedings in conformity with the views here expressed and with those expressed in the opinion of this court rendered April 7, 1900.

Garoutte, J., McFarland, J., Van Dyke, J., and Temple, J., concurred.

The following is the opinion rendered in Bank, April 7, 1900:—

GAROUTTE, J.—This is a suit in equity, brought by plaintiff for an accounting against his trustee, Thomas E. Hughes, and his co-defendants, to whom the trustee made divers conveyances and assignments of the trust property, and who took, as plaintiff claims, with notice of the trust and of plaintiff's rights and equities. The case has been once decided by this court. The plaintiff, and also certain of the defendants, filed petitions for a rehearing. These petitions prayed for a rehearing only as to certain particular matters specified therein, whereupon the judgment of the Department was declared vacated, and a rehearing was ordered as to the matters covered by these two aforesaid petitions. The case is now before us for further consideration.

We first pass to the question involved in the petition for a rehearing filed by the defendants O. J. Woodward and the

First National Bank of Fresno. The trial court made a finding of fact to the effect that the John Brown mortgages, together with the indebtedness secured thereby, were assigned to Woodward for a valuable consideration and in good faith, and that said First National Bank of Fresno is the owner and holder thereof, and that said assignment of these notes and mortgages was made without any knowledge or notice on the part of said Woodward or said bank of any rights of plaintiff thereto. Upon examination of the evidence, we are satisfied it is sufficient to support this finding. As to that portion of the finding bearing upon the ownership of these securities, Woodward testifies that Hughes said he could have the notes for twenty thousand dollars. At that time Hughes owed him fifteen thousand dollars. Woodward says: "At different times, Hughes told me that if I paid him the other five thousand dollars, the notes were mine. He told me that he owed Mr. Dorn one thousand dollars, which could be applied as payment upon the five thousand dollars." The witness then testifies that he paid Dorn one thousand dollars and charged it to Hughes. Then follows his evidence as to an additional transaction, which he claimed made up the balance of the twenty thousand dollars, which was to result in a change of ownership of the securities. He also states that the arrangement was finally consummated with Mr. Hughes, February 23, 1892. Hughes testified directly that these securities were sold to Woodward for twenty thousand dollars. It may be conceded that this evidence is not absolutely convincing, and that it was somewhat weakened by the cross-examination of these two witnesses. At the same time, such concession is not sufficient to justify this court in setting aside the finding of the trial court based upon it. It is next contended that Woodward bought these securities with notice of plaintiff's rights therein. There is no direct evidence supporting this claim. It is insisted that his attorney (Cory) had notice, and that Cory's notice was his notice. But at that time Cory was not Woodward's attorney in this litigation, and his employment by Hughes to examine the *status* of the title of the land involved in these mortgages could in no way bind Woodward. It is also contended that the mere fact of a sale of these securities of the face value of thirty-one thousand dollars for twenty thousand dollars is indicative of fraud. There is no evidence tending to show

their actual value, and for this reason, if for no other, there is no merit in this contention. For these reasons the court's finding supporting the validity of this transaction will not be disturbed. Upon the grounds here stated, the assignment of the notes and mortgages by Hughes to the First National Bank to secure the loan of \$4,605 is also sustained.

The transfer to King amounted to nothing, and the property therein involved should go into the trust fund. Hughes himself would not testify that he was ever paid one dollar by King for the property. He testified: "The fact is, that the sale never went through. The deed was delivered and put on record, and he has never made any deed back yet. I have the deed among my papers. The sale never went through. Mr. King don't claim the property. It is practically in the same condition as though I had never made any conveyance to him." Again, he says: "He [King] does not claim any interest in it. He is willing to deed it back whenever the thing is settled so as to know how to do it. The transfer from King to my son was made at my request." Taking all the evidence of Hughes together, it is entirely apparent that no sale was ever consummated, and the land involved in the transaction should go into the trust fund. The transfer to the son of defendant Hughes by King, falls with the balance of the transaction.

Upon the former hearing it was held by this court that certain conveyances made by Thomas E. Hughes to his son, William M. Hughes, were void, and that a one-half interest in the property therein involved should go to the trust fund. There is hardly a question as to the invalidity of these transfers. William M. Hughes, the son, and the defendant Hughes, the father, were partners in business. The son knew all about the trust agreement, and he entered into these transactions with full knowledge of plaintiff's rights. These transfers being void, all of the property covered by them should go into the trust fund. The assignment to the son, by defendant Thomas E. Hughes, of certain notes and mortgages was also void for the reasons just given. Indeed, the agreement between them, as disclosed by the evidence, was, that the son should take the assignment of these securities subject to the rights of plaintiff, Chapman.

The conveyance by Hughes to his daughter-in-law is also void. The transaction was negotiated by the son in her behalf, and the son's knowledge of plaintiff's rights was her knowledge. There is some slight evidence tending to show that

plaintiff, by subsequent parol consent, recognized the validity of this transaction. But this is a mere matter of evidence, strong or weak, and in no way tends to support the finding of fact made by the trial court upholding the validity of the conveyance. The finding of the trial court in this regard is not supported by the evidence. Upon the same evidence, at another trial, this property should go into the trust fund.

We conclude that the evidence is sufficient to sustain the validity of the transaction with A. D. Colson. The evidence of Colson to this point is sufficient to sustain the finding of fact made by the trial court, and the reference made by Hughes in his testimony to the acts of Colson's attorney is too vague and indefinite to fasten notice upon Colson, the client.

As to the water rights transferred to Maxfield, the finding of the court is sufficiently supported by the evidence. At the same time, the finding is unsatisfactory, in not declaring that the transfer was made as collateral security. The evidence all shows this to be the fact. The water rights being held by Maxfield as security, upon satisfaction of the debt whatever balance of the property may be remaining should go into the trust fund.

The general finding of the court that none of the hypothecations and assignments made by Hughes of the trust property was made in fraud of plaintiff's rights, and that plaintiff has suffered no damage, loss, or injury, by any of the trustee's acts, is not supported by the evidence. This fact is necessarily apparent, in view of what has already been said in this opinion as to the character of many of these assignments and hypothecations.

The finding of fact or conclusion of law to the effect that plaintiff and Thomas E. Hughes "are each entitled to an undivided one half of all said real and personal property, subject to the encumbrances stated and liens thereon as stated," should be set aside. All the property, real and personal, subject to encumbrances should be placed in the trust fund to abide an equitable adjustment of the respective rights of Chapman and Hughes. The succeeding finding, to the effect that plaintiff and Thomas E. Hughes are each the owner of an undivided interest in the securities, etc., must be construed, in view of what has just been said, to the effect that all of the property should go into the trust fund.

It is admitted by the pleadings that Thomas E. Hughes

made conveyances of portions of this realty to his wife. The answer sets out that she was a *bona fide* purchaser for value. The court found against the admission, and declared there were no such conveyances. Practically, the matter is immaterial. But, in view of the conflict between the finding and the admission, the finding is set aside.

There remain but a few other matters suggested by appellant's petition for a rehearing. They appear to be of minor importance, and are not discussed by him at length in any of the various arguments made.

It is further claimed that neither the answers nor the findings are sufficiently clear and explicit in pleading and finding upon the issue of *bona fide* purchaser for a valuable consideration. At the trial the issue was litigated with earnestness and at great length. The pleadings appear to have been recognized as sufficient to squarely present the issue. The findings of fact upon the issue substantially follow the allegations of the pleadings. Under these circumstances we hold the pleadings and the findings in this regard to be sufficient in form.

The following views were enunciated by Department Two, speaking through Mr. Justice Henshaw, upon the former decision of this case. They are now approved by this court in Bank and made a part of this opinion:—

“W. S. Chapman commenced this action against Thomas E. Hughes for an accounting, under an agreement, according to the terms of which the latter advanced ninety-five thousand dollars for the purchase of certain lands, taking the title thereto, and was to sell these lands, reimburse himself for the purchase-money and all other necessary and proper outlays, after which the profits and the remainder of the unsold lands were to be equally divided between himself and Chapman. Hughes, by his answer, did not dispute the terms of the agreement, nor question Chapman's right to an accounting, but, with other allegations, he set out an agreement made between himself and plaintiff, whereunder he was entitled to offset against any sum due from him to W. S. Chapman any indebtedness existing in his favor against E. W. Chapman under another agreement touching the management and sale of lands between Hughes and E. W. Chapman. E. W. Chapman thus came into the case as a party defendant. Afterwards, the plaintiff, W. S. Chapman, filed two supplemental complaints and brought two separate actions, alleging that Hughes had made conveyances of parts of the

lands and of notes and mortgages in contravention of the agreement and in fraud of his rights. The grantees under these conveyances were impleaded and brought in, and a decree was sought annulling these deeds and assignments. After trial and submission of the cause, the court ordered its commissioner to take an accounting between Hughes and E. W. Chapman and report the result. The commissioner found that E. W. Chapman was indebted to Hughes in the sum of \$114,825.30. The court reduced this amount, and found an indebtedness from E. W. Chapman to Thomas E. Hughes of \$67,741.46. It further found that Thomas E. Hughes was indebted to the plaintiff, W. S. Chapman, in the sum of \$55,551.46. Under the agreement above referred to, the indebtedness of E. W. Chapman to Hughes was set off against the indebtedness of Hughes to W. S. Chapman, and Hughes was given a judgment for the difference, amounting to something over twelve thousand dollars. The court further upheld the questioned conveyances made by Hughes as having been executed to purchasers in good faith and for value, and decreed that the unsold property was owned equally by W. S. Chapman and Hughes.

"Upon this appeal the principal attack is made upon the findings of the court upholding the various conveyances made by Hughes, which plaintiff insists were in violation of the terms of the trust agreement and in fraud of his rights, and also upon the ruling of the court admitting a certain judgment roll and giving it the force of an estoppel against the plaintiff. This last question is of vital consequence in the case, and may receive first attention.

"Prior to the commencement of this litigation, W. S. and E. W. Chapman had commenced an action against the defendant Hughes for an accounting with reference to certain real estate transactions under an agreement which then existed between the parties. The facts and the decision of this court upon the appeal in that case will be found in *Chapman v. Hughes*, 104 Cal. 302. The relief sought by the plaintiffs in that action was for an accounting under the so-called 'syndicate agreement,' which they insisted constituted themselves and Hughes copartners. Their whole cause of action rested upon the existence of and the transactions under the 'syndicate agreement.' Hughes, defending, pleaded that the relation of partnership did not exist, that the syndi-

cate agreement did not create a partnership, but that it expired by limitation on August 31, 1889, and that the syndicate agreement was canceled, annulled, and set aside by later agreements of the respective parties, 'as is more fully set forth in the contracts hereinafter particularly set forth.' As to these contracts which Hughes pleaded had been entered into with the effect to cancel and annul the syndicate agreement, one was with and between Hughes, E. W. Chapman, and Richard L. Dixon. It was in the form of a trust deed made by E. W. Chapman to Dixon as trustee. The trustee was to hold the legal title to the lands for two years, or until an earlier termination of the trust by the fulfillment of its purposes, or by the joint revocation of the parties. Hughes, the party of the third part, was diligently to use his personal efforts and experience to effect sales of the land, and after the payment of certain specified sums Chapman and Hughes were to become joint owners in the funds, notes, and mortgages arising from the sales of the lands, and tenants in common of all lands and water rights not sold. Having thus pleaded that the syndicate agreement had been canceled and superseded by the trust deed (and by a certain other agreement with W. S. Chapman which it is not necessary here to particularize), and that no sales of or transactions in the land had been made or had under the syndicate agreement, Hughes added: 'That, subsequent to the execution of said agreement and trust deed of June 20, 1888, the said Richard L. Dixon, the trustee therein named, resigned and relinquished the trust so reposed and vested in him, and the trust thereby created was revoked and terminated, and the legal title to the property therein described was reconveyed and reassigned to and vested absolutely in said E. W. Chapman, subject to the mortgages thereon, but none of the other agreements or conditions contained in said agreement and trust deed were revoked, canceled, annulled, or terminated, but the same remained and continued in full force and effect, and the property therein described was sold and disposed of under said agreement by this defendant, and the moneys and notes and mortgages received, taken, and realized from such sales were paid, given, and delivered to and retained by said E. W. Chapman, and under the terms and conditions of said agreement this defendant is entitled to receive from said E. W. Chapman, upon a settlement and adjustment of their accounts, more than eighty thousand dollars as his share of

the profits of the sales of said lands, . . . and his expenses and commissions in making such sales provided in and by said agreement.' After trial of that cause, the court found, in accordance with the terms of Hughes's defense, that the syndicate agreement had in fact been canceled, annulled, and set aside by the later agreements between the parties, of which the trust deed was one. This determination of the trial court was upheld upon appeal to this court. (*Chapman v. Hughes*, 104 Cal. 302-305.) It is to be borne in mind that the decision of the trial court was, that the making of the agreement with W. S. Chapman, and of the trust deed with E. W. Chapman and Dixon, was understood to operate, and did operate, as an absolute revocation and cancellation of the syndicate agreement. But the court found additionally, as defendant had pleaded, that subsequent to the execution of the trust deed, Dixon, the trustee, resigned and relinquished his trust, and the trust thereby created was revoked and terminated, and the legal title to the property was reconveyed and reassigned to and vested absolutely in E. W. Chapman, but that none of the other agreements or conditions in the agreement and trust deed were revoked, canceled, or terminated, but they all remained and continued in full force and effect.

"The foregoing statement of facts is necessary to the understanding of the question here presented. Upon the trial of the present action, it will be remembered that it was conceded to be Hughes's right to offset against any sum due from him to W. S. Chapman any sum found due to him from E. W. Chapman on account of their land transactions. The basis of Hughes's right to an accounting against E. W. Chapman, and of his claim of indebtedness against E. W. Chapman, is this trust deed. By cross-complaint, Hughes pleaded these matters. For answer, the Chapmans denied that any of the terms or agreements of the trust deed were continued in force after the reconveyance by Dixon to E. W. Chapman of the land, and alleged that the reconveyance was made by a written instrument signed by all the parties to the trust deed, which instrument was set forth at length.

"Upon the trial of the cause, it was contended by the Chapmans that the question whether the trust deed and all its terms and conditions had been revoked by the parties was one open for the reception of evidence and one calling for a construction of the revocatory instrument above referred to.

Upon the other hand, Hughes offered in evidence the judgment roll in *Chapman v. Hughes*, 104 Cal. 302, insisting that the judgment in that case foreclosed the parties, and estopped the Chapmans from raising this question. The court admitted the judgment roll in evidence, and it is not disputed that it was received in evidence in accordance with Hughes's contention that it operated as an estoppel. The finding of the court following its reception in evidence was, that, though Dixon had reconveyed to E. W. Chapman, all of the other terms and conditions of the trust deed remained and were continued in full force and effect, and that consequently Hughes was entitled to an accounting, in accordance with them, of Chapman's transactions with the land. An attack is made upon this finding as being unsupported by the evidence, and upon the ruling of the court in admitting the judgment roll. The admissibility of the evidence and the soundness of the court's finding depend, then, upon the determination whether or not the judgment in the earlier case of *Chapman v. Hughes*, 104 Cal. 302, adjudicated this question so as to stop the parties in this action from further litigating it. We think it did not.

"By section 1911 of the Code of Civil Procedure, that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually or necessarily included therein or necessary thereto. The adjudication in *Chapman v. Hughes*, 104 Cal. 302, was simply and directly to the effect that there had been no transactions in the land under the syndicate agreement, and that the syndicate agreement had been wholly canceled and superseded by later contracts between the parties. The judgment which necessarily followed from this was one denying to plaintiff an accounting under the syndicate agreement. It is true that Hughes, by his answer, pleaded that the trust deed which he said, and which the court found, operated to annul the syndicate agreement had in its turn been modified, and it is true, also, that the court made a finding to this effect; but this was an entirely immaterial allegation in Hughes's answer and defense. It tendered no material issue in the case. A determination upon it one way or the other would not, and could not, have affected the court's decision. When the court had found, as it did, that the syndicate agreement was superseded by the trust deed, it mattered not at all to that action what thereafter might have become of the superseding contract. The immateriality of the issue and of the

finding of the court upon it, is clearly seen when one considers that if, upon appeal, the Chapmans had convinced this court that this finding was wholly unsupported by the evidence, it would not have operated to effect a reversal. If that finding had been pressed upon the attention of this court as being erroneous, it would have not have merited consideration, because the conclusive answer would have been, that, whether erroneous or not, the judgment was in no way dependent upon it. While a general verdict or a judgment operates as an estoppel as to such matters as were necessarily considered and determined, it is never conclusive upon immaterial or collateral issues. (*McDonald v. Bear River etc. Co.*, 15 Cal. 149; *Fulton v. Hanlow*, 20 Cal. 456; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553; *Packet Co. v. Sickles*, 5 Wall. 592; Herman on Estoppel and Res Judicata, sec. 275; Wells on Res Judicata, sec. 295.)

"It follows, therefore, that the judgment was not conclusive upon the parties in this particular, and the question whether or not the terms and conditions of the trust deed continued in force was not *res judicata* between the parties, but remained an open question, which the court in this case was called upon to decide upon its merits. It was therefore error for the court to have admitted the judgment roll in evidence.

"Under this conclusion must fall to the ground the whole account stated between Hughes and E. W. Chapman, since Hughes's right to an accounting was a question first to be determined by the court, upon competent evidence, before the taking of an account could be ordered; and as the judgment in this case offsets against the amount which the court finds due from Hughes to W. S. Chapman, the larger amount which it finds due to Hughes from E. W. Chapman, with the result that a judgment in favor of Hughes for over twelve thousand dollars is given, it also follows from the foregoing that this judgment must be reversed and the cause remanded.

"But, in contemplation of a new trial, other points and propositions advanced by appellants merit consideration. These questions arise out of certain sales, transfers, and assignments made by Hughes of parts of the land, and of mortgages and notes, proceeds of the sales of parts of the land. It cannot be assumed, however, that the evidence which may be adduced at the second trial concerning these matters will be identical with that shown in the present record, and therefore the observations of the court relative thereto can only be con-

sidered with reference to the facts as they now appear. And first, generally, as to the sales of land made by Hughes which are attacked as being in fraud of plaintiff's rights. Some of these sales were made to relatives of Hughes; some, it is contended, were mere gifts made without valuable consideration; as to all, it is charged that the vendees took with notice or with actual knowledge of plaintiff's rights. But in each of these cases the defendant Hughes charged himself, in his account with Chapman, with what appears to have been the fair and full value of the land so disposed of. At any rate, we fail to find any attack upon this particular point, and the court seems to have regarded these charges as being adequate. If, then, the defendant Hughes were solvent, and able to respond promptly to any sum which might be found against him upon the accounting, it would really matter little to the plaintiff whether he were to be allowed the fair value of his share of these lands in money, or whether the sales should be set aside as fraudulent, and the vendees charged as involuntary trustees, holding an undivided one-half interest in the lands for the plaintiff. But there are other considerations which make the matter of some consequence. First, plaintiff charges that the defendant Hughes was and is insolvent, and though the finding of the court is against him upon this point, he is, of course, not obliged to accept it. If in fact Hughes is insolvent, or should prove unable to respond promptly to such money judgment as might be awarded against him, it would indeed be a matter of much consequence to the plaintiff to reduce an uncollectable money judgment by the value of the lands in question, and have those lands made available to his ends. And again, without regard to the benefits or injuries which may follow, the plaintiff occupying the position of a beneficiary under the trust agreement between himself and Hughes, Hughes, being his agent and trustee, is entitled to enforce the agreement to the letter and to insist that every transaction in the land which is in violation of the terms of the agreement, and of which fact the vendee had knowledge or notice, may be avoided.

"By one of the transactions to which general reference has just been made, defendant Thomas Hughes conveyed to his son, William M. Hughes, a portion of the land embraced

within the agreement between himself and Chapman. The conveyance was made after the commencement of this action. The consideration for it was the son's equity of interest in the Hughes block and in the Hughes hotel. Thomas Hughes testified that he received no cash; that he made the contract with him to clean up all his interest in the partnership business; that the consideration was eight thousand dollars, and that he entered that as so much received under a cash sale. The finding of the court is, that William M. Hughes had no notice or knowledge of plaintiff's right in the property; that the conveyances were made without intent to defraud plaintiff, and were made in good faith and for a valuable consideration. But so much of the finding as declares that the defendant William M. Hughes had no notice or knowledge of plaintiff's rights in the property is unsupported by and contrary to the evidence. There is evidence tending to show that he did not know that the particular property in question was affected by the suit for an accounting which Chapman had brought against his father, but he testified that he was his father's partner, was familiar with his business, and had knowledge of the terms of the contract between his father and Chapman. He knew, therefore, that by the terms of the trust his father's power was limited to the right to sell. 'Sale,' in law, has a well-defined meaning, and trustees empowered to sell real estate are not authorized to exchange it for other lands. (*Ringgold v. Ringgold*, 1 Har. & G. 11.¹) As to one who has notice of the terms of an express trust, which terms are expressed in the instrument creating the estate, every transfer or act of the trustee in contravention of the trust is absolutely void (Civ. Code, sec. 870), and every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration. (Civ. Code, sec. 2243.) Under the evidence, this transaction between father and son was but an exchange of properties, and while it is true that the father charged himself in his account with Chapman with the sum of eight thousand dollars as though it were cash received, the fact remains that the transaction was not for cash, and was not a sale at all.

"Thomas E. Hughes conveyed to Miss Bernhard, now Mrs.

¹ 18 Am. Dec. 250.

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Patterson, certain pieces of property. The conveyances were in fact mortgages given as additional security to Miss Bernhard for moneys which she had loaned to Thomas E. Hughes. However different the rule may be in other states, it is well settled in this, that one who takes a mortgage to secure a pre-existing debt is a purchaser for a valuable consideration. (*Frey v. Clifford*, 44 Cal. 335; *Connecticut Life Ins. Co. v. McCormick*, 45 Cal. 580.) So much having been established, it was incumbent upon the plaintiff to show that she took this conveyance with notice or knowledge of his rights. There is no evidence to establish that she had any actual knowledge, but her agent in the transaction was William M. Hughes, and while, under the evidence, he is not chargeable with notice that the particular land conveyed was embraced within the accounting suit, yet, as has been before said, he did have full knowledge of the terms of the trust agreement between his father and Chapman, and with that information knew that his father was empowered merely to sell. The knowledge of the agent in this particular must be imputed to his principal.

"As to all of these transactions, respondent makes the objection, that as plaintiff had sued Hughes for a full accounting, and as such an accounting had been made, followed by a judgment and the satisfaction of plaintiff's right, the plaintiff must be held to his election, and cannot be allowed to recover the moneys due upon account of these sales and transfers from Hughes, and at the same time pursue the vendees and transferees for a recovery of the property. But this is not what plaintiff is doing. He sued his trustee, Hughes, for a general accounting, but at the same time specifically objected to and attacked certain of the trustee's dealings with the land. These were upheld by the court, and the value of the land, sales, and assignments charged against Hughes. But plaintiff has the unquestionable right, as has before been considered, to insist that he shall not be forced to take this judgment in money, but that he shall be permitted to recover the property which has been improperly or fraudulently disposed of. Nor can the fact that the court awarded plaintiff a monetary judgment be held to estop plaintiff or bind him to its acceptance.

"Respondent further urges and argues that Hughes's vendees and transferees may not thus be brought into court because Hughes became vested with the entire and absolute legal and beneficial ownership in the land, with full power

of disposition and control, and free from any trust, and that Chapman's sole relief is in a suit for an accounting or for a breach of contract. The cases which respondent cites in support of this proposition are those declaring the well-recognized and sound principle that no resulting trust arises to the grantor where the grantee takes upon a valuable consideration. (2 Perry on Trusts, sec. 151; *Gibson v. Armstrong*, 7 B. Mon. 489.) But in this case plaintiff is not suing to have a resulting trust declared in his favor, but he is suing to enforce his rights under an express trust formally declared by an instrument in writing.

"By the terms of the agreement between the parties, Hughes was to discharge the mortgage which he gave to Montgomery. Ten thousand dollars of this, it seems, has not been paid. Appellant insists that Hughes should be charged with this balance. That may in strictness be so, but if so charged upon the one hand, upon the other he must be credited with that amount as a payment, for, since upon the payment of the mortgage he was entitled to repayment from the proceeds of the sales of the property, if he is to be charged with this ten thousand dollars, provision must be made for reimbursing him.

"It is to be remembered that while this was originally a simple action by Chapman against Hughes for an accounting, it subsequently became complicated by supplemental pleadings and the addition of new parties defendants. Of these, one was the defendant E. W. Chapman, against whom Hughes was seeking an accounting, and others were grantees and transferees of parts of the land and of mortgages and of mortgage notes. Although these actions were consolidated and tried as one, and a single judgment entered, yet between these defendants there was no privity nor common interest. It would therefore be unjust to force a defendant who has established the validity of his purchase to litigate the matter anew because the findings of the court in some other respect not material to his rights have been successfully attacked.

"Therefore, in subservience of the ends of justice and the rights of the parties, it is ordered that the judgment appealed from be vacated. It is further ordered that a new trial be had upon the issues touching the right of Hughes to an accounting with E. W. Chapman; that if, after such hearing, the court shall determine that Hughes is entitled to an accounting, it shall take or order taken such an account, to

the end that the sum found due, if any, from E. W. Chapman to Hughes may be set off against the sum found due, if any, from Hughes to W. S. Chapman. It is further ordered and adjudged that the accounting between W. S. Chapman and Thomas E. Hughes be affirmed in all respects as settled by the court, and that his sales, transfers, and assignments of parts of the land, and of the proceeds of sales of parts of the land, be affirmed in all respects as found by the court, saving as to those matters and as to those findings hereinabove considered as to which it has been declared that the findings are not sufficiently supported by the evidence. As to such transactions, a further accounting shall be had in accordance with the rulings of this court, upon which accounting proper evidence adduced by any of the parties shall be received and considered."

Henshaw, J., Temple, J., McFarland, J., Harrison, J., and Van Dyke, J., concurred.

[S. F. No. 2755. In Bank.—December 4, 1901.]

CHRIST KNUTTE, Petitioner, v. SUPERIOR COURT OF
THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

CONTEMPT—IMPRISONMENT FOR NON-PAYMENT OF RENT—CONSTITUTIONAL LAW.—Rent due and unpaid constitutes a debt from the tenant to the landlord, and upon the tenant's refusal to pay it to a receiver, in pursuance of an order made in an action to foreclose a mortgage of the leased premises, the court has no authority to punish its non-payment by imprisonment for contempt. Such a proceeding is in contravention of section 15 of article I of the state constitution, forbidding the imprisonment of any person for debt in any civil action, except in case of fraud.

APPLICATION for a writ of prohibition to the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Daniel Suter, for Petitioner.

Samuel H. Samter, for Respondent.

THE COURT.—The petitioner sued for and obtained an alternative writ of prohibition from this court, upon averments in his petition to the effect that he was the grantee of the mortgagor and in possession of the mortgaged premises; that a foreclosure suit had been instituted and a receiver appointed, and that by order of court he was directed to attorn to the receiver and pay a monthly rent of twelve dollars, or surrender possession of the premises; that for his refusal so to do he was cited before the court, and that the court made its order that he pay to the receiver twelve dollars a month rent. Upon his refusal to comply with this order, he was cited to appear before the court and show cause why he should not be adjudged guilty of contempt for failure to comply with the order made and entered directing him to pay the sum of twelve dollars per month rent; that there was every reason to believe that as a result of these proceedings he would be unjustly and unlawfully found guilty of contempt and punished accordingly.

The proposition thus presented, and the one argued upon the hearing, was the right of the court to enforce the collection of rent by summary proceedings in contempt. Section 15 of article I of the constitution of this state forbids the imprisonment of any person for debt in any civil action, except in case of fraud, and it is conceded that a judgment in contempt against this petitioner for his refusal to pay rent, or an order directing him to stand committed until he pay the rent, would be violative of this provision of the constitution, and void, if the rent due shall be regarded, within the meaning of section 15, as a "debt." But it is so plain a proposition that rent due and unpaid constitutes a debt from the tenant to the landlord, that the need of discussion upon the question is absolutely foreclosed. The proceedings in contempt, having for their avowed end the enforcement of the order of court for the payment of rent, are illegal and unconstitutional.

It is therefore ordered that the rule be made absolute and the respondent be prohibited from proceeding further in the said matter of contempt.

[S. F. No. 2738. Department One.—December 4, 1901.]

In the Matter of the Estate of THEODORE L. JOHNSON,
Deceased. MARY E. JOHNSON, Appellant. MARY
J. JOHNSON, Respondent.

**PROBATE OF WILL—DESTROYED OLOGRAPHIC WILL—SIGNED COPY—
FRAUDULENT DESTRUCTION NOT SHOWN.**—An olographic will destroyed in the lifetime of the testator cannot be admitted to probate, if not "fraudulently destroyed." Such a will, if destroyed by a friend in the presence of the testator, as being, in his expressed opinion, of no further use after the testator had, under the friend's advice, executed a typewritten copy, signed by the friend as a witness, was not "fraudulently destroyed," within the meaning of section 1339 of the Code of Civil Procedure.

ID.—FRAUD—UNTRUE ASSERTION—MATTER OF OPINION.—The "assertion of that which is not true," in order to constitute fraud, under subdivision 2 of section 1572 of the Code of Civil Procedure, must be of some *fact* not warranted by the information of the person making it, and cannot be held to include the opinion of the person, however erroneous it may be, or however positively asserted.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying probate to a destroyed olographic will. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Edward C. Harrison, for Appellant.

Bishop & Wheeler, and Bishop, Wheeler & Hoefler, for Respondent.

HARRISON, J.—The appellant presented to the superior court an application to have admitted to probate as a last will and testament a certain document annexed to her petition, which she alleged to be a true copy of a will executed by her husband, and fraudulently destroyed in his lifetime. The respondent filed a contest of the petition, and upon the hearing the following facts were shown: The decedent made and signed an olographic will, sufficient in form, upon two separate sheets of paper, on the first of which was written all of the will except the last two lines and his signature. After he had made this will, a friend of his, named Neville, to whom he exhibited it, suggested to him

that the will might be ineffective if the last page should be lost, and advised him to have it rewritten. Upon his reply that he would be unable to write it over, as he was soon to leave the city, Neville stated to him that he would take it and have it typewritten, to which the deceased assented. Neville thereupon took the will away, and on the next day day returned with it and a typewritten copy. After reading the typewritten copy, the deceased signed it, and Neville also signed it as a witness. Upon the suggestion of Neville that there should be another witness, he replied that there was no one else there that could witness it, and that there was no necessity. Neville thereupon took up the olographic will, and saying that it was of no further use, tore it up in the presence of the deceased, and threw it into the waste-basket. The deceased suggested that he might have kept it, as the typewritten will might get lost, but made no effort to prevent its destruction.

Upon this showing the court held that the will had not been fraudulently destroyed, and denied it probate as a lost will. From the order entered thereon the present appeal has been taken.

Section 1339 of the Code of Civil Procedure declares: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator." The appellant concedes that there was no actual fraud on the part of Neville in his destruction of the will, but contends that there was constructive fraud, within the provision of subdivision 2 of section 1572 of the Civil Code, which declares that "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true," constitutes actual fraud, and within the provision of subdivision 2 of section 1573, which makes constructive fraud to consist "in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

"The assertion of that which is not true," which is thus made actual fraud, must be of some *fact* not warranted by the information of the person making it, and cannot be held to include an opinion of the person, however erroneous such opinion may be, or with what degree of positiveness it may be asserted. The statement of Neville to the deceased was not the assertion of any fact, but was merely the expression of his opinion as to the effect produced upon the first will

by the execution of the subsequent one. It might quite as well be contended that the mistaken opinion of the deceased, that one witness to the typewritten will was sufficient, was the cause of his supposing that the prior instrument would be of no further use. Even if Neville had been the professional adviser of the deceased in the preparation of his will, and had advised him that the first will was superseded by the second, and of no further use, and had thereupon destroyed the first instrument under the circumstances shown here, it could not be maintained that there was any constructive fraud.

The order is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1830. Department Two.—December 4, 1901.]

D. S. LEVY, Assignee, etc., Appellant, v. ALEXANDER IRVINE et al., Respondents.

INSOLVENCY—ACTION BY ASSIGNEE—PREFERENCE OF CREDITOR—NOTICE OF INSOLVENCY—VERDICT AGAINST EVIDENCE.—In an action by an assignee in insolvency to recover the value of goods of the insolvent attached and sold by a creditor, a verdict for the defendant is against the evidence, where it appears without conflict that the creditor either knew or had reasonable cause to believe that the debtor was insolvent within the meaning of the statute, and that the debtor also knew that fact, and that the purpose of both of the parties in procuring the attachment, judgment, and execution was to give a preference to such creditor, and prevent the property of the insolvent from being distributed ratably among his creditors.

ID.—MEANS OF KNOWLEDGE OF INSOLVENCY—CREDITOR PUT UPON INQUIRY.—Where the creditor had full means of knowledge of the debtor's insolvency, and ample opportunity to discover the facts from the books of the debtor, placed in his hands, if he failed to investigate when thus put upon inquiry, he is chargeable with all the knowledge of the insolvency which he would reasonably have acquired if he had performed his duty.

ID.—WILLFUL IGNORANCE EQUIVALENT TO KNOWLEDGE.—A creditor cannot willfully shut his eyes to the means of information known to be at hand, and if he does so, his willing ignorance must be regarded as equivalent to actual knowledge.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Edward Myers, and H. H. Lowenthal, for Appellant.

Charles F. Hanlon, for Respondents.

CHIPMAN, C.—Plaintiff is the assignee of James Clulow, an insolvent debtor, and brought the action, under section 55 of the Insolvent Act of 1880, against Alexander, James, and William Irvine, partners as Irvine Brothers, and D. E. Besecker. The object of the action was to recover the value of certain goods attached and sold at the suit of Besecker against Clulow. Mr. Besecker is a practicing attorney and a professional collector, and was the nominal plaintiff, and brought this latter suit for the benefit of Irvine Brothers on Clulow's note, assigned by them to him. The cause was tried with a jury, and defendants had the verdict. Plaintiff appeals from the order denying his motion for a new trial. He contends that the evidence is insufficient to sustain the verdict, and this is the principal question in the case. As we think this contention must be sustained, it becomes necessary to state the evidence somewhat at length. Clulow kept a retail shoe-store in San Francisco. Irvine Brothers were grocers, and had several stores in that city. The firm assisted Clulow by occasional loans of money; eighteen different amounts were loaned to him, aggregating \$2,779.49. The firm loaned Clulow twenty dollars on August 7, 1894. James Irvine, one of the firm, testified that at the time they made this loan he told Clulow that he wanted to have a talk with him at his (Clulow's) store, and they met there by appointment on the following Sunday, August 13th. Irvine took with him a card on which were written the dates and amounts of the several loans made by the firm to Clulow to that date, which showed the total to be \$2,704.49. Irvine asked Clulow to show him the account in his ledger, which Clulow did, and Irvine found that some of the notes were not entered, but Clulow agreed that the card was right. During the following week, on August 17th, not being able to pay his rent, Irvine Brothers advanced Clulow \$75 more, and this brought the account to \$2,779.49. Irvine testified, that at this time Clulow said he owed Johnson & Co. a bill

of about one hundred dollars, which he had promised to pay the following Monday morning, August 20th, but could not, and he asked Irvine Brothers to advance the amount; that he, Irvine, promised to see his brother, Will Irvine, about it, and they arranged to meet Clulow at his store the following Sunday, August 19th, but, after talking the matter over, they refused to make the loan; James Irvine met Clulow on Sunday, the 19th, and told him they would "close him up in the morning, or attach him in the morning"; adding, "So in the morning I went to Besecker and I told him to attach the store. I went down-town with Besecker in his buggy; he went to his office, and he told us that we had better have one note to cover all the other small notes, so as to save trouble. Besecker asked me to bring Clulow around to his office, and I did so, and the other note was drawn by Besecker and acknowledged by Clulow." The note included \$456, the amount of two notes due one Hutchinson and one Thompson, and this brought the entire amount to \$3,235.49, the amount sued for by Besecker. Just how the Irvine Brothers came to hold these last two notes or to include them in the settlement note is not explained. Clulow denies that they were intended to be included in the Besecker note, but the evidence shows that in no other way can the amount be accounted for, and that Clulow executed the new note in Besecker's office is clearly proven. Irvine testified in chief that in his conversation with Clulow, "to the best of his recollection, Clulow mentioned the only bill that was due or that he had to pay was Johnson's bill and some other bills that were not due, that he could meet as they came along, or something to that effect." He further testified that when he loaned the seventy-five dollars, to the best of his knowledge he did not know "of anything outside of these small bills which he said he would meet as they came along, and the Johnson bill." On cross-examination, he was shown the ledger, and was asked if, when he went to Clulow's store, he examined any accounts other than his own. He answered: "I do not remember of looking at any other individual account on that day besides our own, nor before or after that day. I do not remember whether I saw any other account. I was there, at the store, two Sundays before it was closed. I was also there the Sunday preceding the Monday morning it was closed; it was early Sunday afternoon when I got there,—twelve or one or two o'clock. I stayed there two

hours. We got talking over what he thought he could do about paying our bill. . . . I remember Clulow had been promising right along to start in and pay us a certain sum each month on our account; he said that he would get the stock up a little, and he thought he would see his way clear to pay us certain moneys on account. On this particular Sunday, as far as I can recollect, he mentioned about this Johnson account, and he said that after that was met, and some other small bills, he thought he would be able to start in and pay us some money each month. But before he could do that he wished us to advance some money to buy some goods to stock up a little with. . . . Of course we had many other words, but I do not remember them. I told him I would not advance him any more money until I could consult my brother Will. I don't think I told him I first wanted to see how he stood. I asked him about it, of course, and he gave me some kind of a statement that was not satisfactory. I don't remember what it was or what he said." He was asked if Clulow told him about Bannister & Co.'s bill of fifteen hundred dollars, and he answered, "I don't think I knew the indebtedness to Bannister & Co. I think he mentioned a note for one hundred and fifty dollars about due on the Bannister account, but I do not remember when the note was due or anything about it. I knew he owed Bannister & Co. some money, but I did not know the amount. I knew he was buying boots and shoes from Bannister & Co. I believe Clulow mentioned to me a note coming due to Bannister & Co.; and after that note was paid and Johnson's he would soon be able to pay us some money." He was asked whether mention was made of August Lane & Co. having two notes past due, and answered: "I don't know about his mentioning that the firm had two notes. I will not swear he did not. Q. Did he tell you about owing \$159 to the shoe-house of Cahn, Nicklesburg & Co.?—A. He may or may not. I would not swear. He did not mention any note to them. Q. After that two-hours' talk there, you came to the conclusion that you would not give him a chance to take those notes up in monthly payments?—A. When I came to think it over, he had made so many promises in the same direction, I concluded that I could place no confidence in his promises, and I decided that it would not be safe to do so." After speaking of meeting Clulow, on the 19th, at his store, he said he met Clulow at witness's store on Polk Street, with his brother Wil-

liam, and the matter of further advancements was talked over. He testified: "He [Clulow] mentioned the Johnson bill, due on Monday morning, and wanted us to advance this money, so we decided that we would not advance that money. I think he did tell me, perhaps, that Johnson had threatened an attachment. . . . I told him I thought very likely we would attach him Monday morning. . . . I do not remember that I told him I wanted to get in ahead of Johnson; I will not swear whether I did or not." He was asked if he did not say he ought to be protected in preference to anybody else. "A. I do not remember the conversation. Q. Will you say that you did not ask him to give you a preference as against any other creditor; that you were entitled to it?—A. I don't remember whether I did or not; I may or may not have told him so." He was asked if he didn't say he had furnished cash, and others had given him goods, and for that reason he was entitled to a preference. "A. I don't know. I felt pretty anxious about my money, but I cannot remember what I said to him; that was Sunday night. I was there Sunday night, August 19th, in the store. I got there in the afternoon, and may have stayed one or two hours at that time." In this connection it may be stated that Clulow testified that Irvine examined the ledger carefully. But Irvine testified that he looked into it to see how his own account stood, but did not examine the other accounts in it. The ledger was used at the trial, and the evidence was that there were several accounts in it besides Irvine Brothers', showing quite large indebtedness. There were some of his creditors, also, whose names did not appear in the ledger, but were scheduled by Clulow in his insolvency petition filed August 28, 1894, the total indebtedness being over nine thousand dollars, including Irvine Brothers' claim. William Irvine testified: "I saw Mr. Clulow on the Sunday before the attachment. The store was closed on Monday. . . . I knew my brother James was in Clulow's store a part of the time that Sunday. . . . He said he was down there, looking at Clulow's standing. He was anxious about his money; as near as I can remember those are the words he said. . . . He did not tell me anything about how much Clulow owed, or how much he owed to other creditors." The witness could not remember what Clulow said about his business affairs or indebtedness; witness "had no talk with him about how much he owed"; his "brother did all the talking"; could not re-

member that his brother James asked Clulow for money; "he wanted to see how his standing was, of course, my brother did; he did not tell me what his standing was. When my brother asked him about his standing, I cannot remember what Clulow said to him. Clulow wanted money, but I don't know how much he wanted, nor what he wanted the money for." When asked if Clulow did not say he wanted money to pay creditors who were pressing him, the answer was: "I cannot remember; Mr. Clulow might have been in the store half an hour. I cannot remember what was said there." He was asked: "Did you, that night, tell Clulow to go to the store and take out his tools and clothes?— A. Yes, sir; I think I am sure of that." Being asked what prompted the advice, he replied: "We had an idea we would close him up the next day; I believe I told Clulow so; that was the understanding between us three; I don't remember whether I told him or not." About nine o'clock the next morning, James Irvine took Clulow to Besecker's office; Clulow stated to Besecker that he and the Irvine Brothers had agreed as to how much he owed them, and he handed Besecker a bundle of notes and asked him if they could not be put in one note, dating the note one week back, the date of the settlement. Besecker asked him "if he owed anybody else any money, and he said he owed a few dollars, but it did not amount to anything." The note for \$3,235.49 was then drawn by Besecker and signed by Clulow, and was dated August 13th, payable one day after date, and was assigned to Besecker. Besecker testified: "I demanded the money from him then; he said he could not pay it; then he went away." Besecker explained to Irvine that it would take a long time to prepare the complaint with all the notes in it, and that he (witness) preferred to have it in one note. Irvine replied, "Well, I have no doubt Clulow will sign it," and witness called Clulow into his office, and the figures were gone over, and he signed the note. Besecker testified that he then prepared the papers in the attachment suit, "filed the complaint (which was verified by Irvine), got out an attachment, and went down with the deputy sheriff and attached the store. Clulow was there when I arrived, about eleven o'clock, with the sheriff, and he said to us, 'Lock up the place.' We locked up the place, and he went away. I said to him as I left him, 'Clulow, if you have time this afternoon, come in and see me,' and he said he would." At one o'clock, Clulow

went to Besecker's office; a clerk was called in and served the complaint and summons. After the clerk had gone out, Besecker said: "Now, what is the use of having these ten days of sheriff's fees piled up? You may just as well shorten the time. These are your only creditors, I understand; what is the use of having all this time wasted? He said, 'Well, if you want me to sign anything, I will sign it.' I dictated to my stenographer in the room this answer, and he waited until she wrote it out, and after she wrote it, I read it to him again." The witness then stated that Clulow went before a notary with the answer. It is dated August 20th and was verified that day, and is marked "Filed August 21st." It reads as follows: "Now comes the defendant, James Clulow, and consents and authorizes judgment to be taken in this action against him, in favor of said plaintiff, for the sum of \$3,245.49 and costs of suit." It recites that defendant borrowed money from Irvine Brothers at various times, and gives a schedule of the amounts and dates, commencing March 1, 1893, and ending August —, 1894. This last item was seventy-five dollars, and was the money advanced August 17th,—in fact, four days after the date of the note sued on by Besecker. Recites that the money was used in his business and "the paying off of a certain chattel mortgage made by this defendant to one Mrs. Quinting for fourteen hundred dollars or thereabouts; that on August 13, 1894, said defendant made, executed, and delivered to said Irvine Brothers his certain promissory note, which is the note mentioned in this action and sued on herein for the amount therein mentioned of \$3,235.49." Besecker took the answer into court and filed it the next morning, August 21st, and on his own motion, in open court, judgment was ordered, and he went into the clerk's office and had the clerk enter the judgment. It reads: "In this cause, upon reading and filing the consent of the defendant herein, it is ordered," etc. Besecker then had execution issue that afternoon and levied on the property attached, and the entire stock of goods of Clulow was sold, bringing \$1,640, which the evidence shows was after spirited bidding by competitors at the sale, and the evidence also shows that the property brought all it was worth. There was a chattel mortgage on the entire stock of goods, which had been recorded, but the mortgagee did not take possession. The property was bought in by one Downey, Irvine Brothers furnishing the money, to whom Downey turned over the goods. They paid the chattel mortgage, and

after paying sheriff's costs, James Irvine testified they realized "only about four hundred dollars." Besecker testified, on cross-examination, that before the complaint was prepared Clulow told him Johnson & Co. were pressing him and threatening to attach him, and that he, Besecker, wanted to get in his attachment first; that when he attached the goods he did not look into the books to ascertain Clulow's indebtedness to other creditors; that Clulow told him "he owed a few dollars," but witness did not inquire to whom, nor did he ask him if the books showed his indebtedness.

The essential facts are without conflict. It is not necessary to look beyond the testimony of defendants' witnesses to discover the true character of the transaction. It is perfectly evident that Irvine Brothers knew, or had reasonable cause to believe, that Clulow was insolvent, within the meaning of the statute,—i. e., was unable to pay his debts from his own means, as they became due, and that Clulow also knew this fact in August, 1894; the evidence admits of but one reasonable or rational inference as to the purpose of these parties in procuring the attachment, judgment, and execution, and that purpose manifestly was to give Irvine Brothers a preference, and prevent the property of Clulow from being distributed ratably among his creditors. It is idle to argue that Irvine Brothers did not know or actually believe Clulow to be insolvent, for they had reasonable cause to believe that he was insolvent, and that is sufficient to satisfy the statute. (*Washburn v. Huntington*, 78 Cal. 573.) Irvine Brothers had the means of knowledge, and they were put upon inquiry by many facts and circumstances to which they themselves testify. James Irvine had the ledger of Clulow in his hands, and looked into it; he visited the store several times to ascertain the standing and condition of Clulow—at one time, on Sunday, August 19th, spending two hours alone with him. There was ample opportunity to make an approximate estimate of his stock on hand, and Irvine, being himself a merchant doing large business, was familiar with the work; he had Clulow's books before him, and yet with all these means he testified that he did not do the very thing which common prudence demanded that he should do. Failing to investigate when put upon inquiry, he is chargeable with all the knowledge which it is reasonable to suppose he would have acquired if he had performed his duty. A creditor cannot willfully shut his eyes to the means of information which he knows is at hand, and if he does so, his willing ignorance

is to be regarded as equivalent to actual knowledge. That the purpose of Clulow and Irvine Brothers in procuring the attachment was to give the latter a preference in the face of reasonable cause to believe, if not actual knowledge, that Clulow was at the time insolvent, is too plain from the evidence to admit of any reasonable doubt. It is not necessary to consider those cases where the knowledge or intent exists in the mind of one of the parties alone. (*Tapscott v. Lyon*, 103 Cal. 297; *Haas v. Whittier*, 97 Cal. 411, and other cases.) Here, the evidence, without conflict, shows that they acted together, Clulow with actual knowledge of his insolvency, and Irvine Brothers with at least reasonable cause to believe him to be insolvent. Much comment of counsel is made as to the character of the answer of Clulow to Besecker's suit, dictated and procured by Besecker himself. Appellant insists that it was a confession of judgment, and that the presumptions which attend such an act must be indulged. Respondents contend that it was an answer in the case, and must be treated as any other answer. It certainly was not such technical confession of judgment as is contemplated by sections 1132 et seq. of the Code of Civil Procedure. But as evidence of the intention of the parties to enable the plaintiff to get his judgment and execution served before other creditors could avail themselves of the Insolvent Act, and as evidence of an intention by the parties that Irvine Brothers should have a preference, it is very significant; and this, with the unmistakable evidence that both knew or had reasonable cause to believe Clulow to be insolvent, together with the other undisputed facts in the case, compels the conclusion that the verdict was without support. The trial court should have granted the motion for a new trial, and, we think, erred in refusing to do so.

It is unnecessary to consider the numerous alleged errors of law committed at the trial.

It is advised that the order be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order is reversed. Henshaw, J., McFarland, J., Temple, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[Sac. No. 968. Department Two.—December 4, 1901.]

NATIONAL BANK OF D. O. MILLS & CO., Appellant, v.
A. S. GREENLAW, Treasurer, etc., Respondent.

RECLAMATION DISTRICTS—LEGAL INTEREST UPON UNPAID WARRANTS—APPLICATION OF STATUTES.—The unpaid warrants of reclamation districts bear legal interest, under sections 3456 and 3457 of the Political Code, which is to be computed at the rate of seven per cent per annum, as fixed by section 1917 of the Civil Code. Section 71 of the County Government Act, providing for five per cent interest upon warrants not paid for want of funds, applies to county warrants, and does not include the warrants of reclamation districts.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge.

The facts are stated in the opinion.

A. M. Seymour, and White & Miller, for Appellant.

A. L. Shinn, for Respondent.

HAYNES, C.—*Mandamus*. Plaintiff is the owner of warrant No. 222, drawn by the trustees of Reclamation District No. 551, on June 5, 1895, for the sum of \$3,851.50, upon the defendant, as county treasurer. Said warrant was, on June 7, 1895, presented to the defendant for payment, but there being no funds in the county treasury to the credit of said district with which to pay the warrant, the treasurer indorsed thereon the fact and date of its presentation, the non-payment thereof, and thereupon duly registered said warrant. On April 24, 1901, said warrant was again presented for payment, and defendant then offered to pay the same, with interest thereon from the date of first presentation at the rate of five per cent per annum. Plaintiff demanded payment, with interest at seven per cent, and defendant refused to pay interest at that rate, and on plaintiff's petition setting forth said facts, an alternative writ of mandate was issued and served. Defendant demurred to the petition for want of facts sufficient to constitute any ground for relief, and upon the hearing the demurrer was sustained and judgment entered for defendant, and the plaintiff appeals.

The only question made or discussed is, whether the rate of interest upon said warrant is five per cent or seven per cent.

The assessments levied upon reclamation districts are required to be collected and paid into the county treasury, and placed in a fund to the credit of the district, and paid out by the treasurer upon warrants of the district. (Pol. Code, sec. 3456.) Section 3457 of the Political Code, as amended March 30, 1874, provides: "The warrants drawn by the trustees must, after they are approved by the board of supervisors, be presented to the treasurer of the county, and if they are not paid on presentation, such indorsement must be made thereon, and they must be registered, and bear interest from the date of presentation; provided, warrants heretofore issued shall bear no interest." Prior to this amendment there was no provision in said section relating to interest.

Another provision of the Political Code relating to warrants of reclamation districts is found in section 3456, as amended in April, 1876, which provides for the collection of assessments made upon such districts, to the effect that such assessments shall be paid in gold coin, "or in warrants drawn by order of the trustees thereof, and approved by the board of supervisors of the county. Where payment is made in the warrants of the district, *legal interest* must be computed thereon from the date thereof to the time of such payment, when such warrants must be surrendered to the treasurer and by him canceled."

The Political Code not having specifically expressed in words or figures the rate of interest such warrants should bear, appellant contends that the rate is fixed by section 1917 of the Civil Code, which (so far as material here) provides: "Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per cent per annum, after they become due, on any instrument of writing, except a judgment."

Respondent contends that the rate of interest upon the warrant in question is fixed by section 71 of the County Government Act (Stats. 1897, p. 477), which provides: "When any warrant is presented to the treasurer for payment, and the same is not paid for want of funds, the treasurer must indorse thereon, 'Not paid, for want of funds,' and sign his name thereto, and from that time until paid the warrant bears five per cent interest per annum." His argument is, that the words "any warrant" include warrants of reclamation districts, and fix the rate to be paid upon the warrant in question. This contention cannot be sustained. The County

Government Act of 1883 (Stats. 1883, sec. 74, p. 318) fixed the rate of interest upon warrants not paid for want of funds at five per cent per annum, but section 76 of said act shows that the warrants there referred to were "county warrants." That rate has not since been changed, and every county government act since passed continues that rate of interest, and contains the same reference to "county warrants." The Political Code, as originally adopted, contained substantially the same provisions as the County Government Act of 1883, except that it fixed the rate of interest upon county warrants at seven per cent (2 Ann. Codes 1872, p. 201, sec. 4178), while the same code was silent as to interest on warrants of reclamation districts. (See 1 Ann. Codes 1872, p. 646, sec. 3457.) If the legislature had intended, when it amended said section 3457, that warrants of reclamation districts should bear the same "interest" that county warrants bore, we may well presume it would have said so; and that in amending section 3456, instead of providing that such warrants should bear "legal interest," it would have made a like reference. The Civil Code fixed the rate of interest in all cases, in the absence of "an express contract in writing," and we cannot infer that the legislature intended to fix a different rate in any particular case by anything less than an express statement of the rate to be charged, or by an express reference to some other statute fixing a different rate. In the absence of such reference to a particular statute fixing a different rate, the word "interest," or the words "legal interest," mean, in a statute, what they would be held to mean if used in a contract in writing between individuals.

Our conclusion is, that the demurrer to the petition is not well taken, and as the answer denying that said warrant bears interest at the rate of seven per cent raises no issue of fact, that the judgment be reversed, with directions to overrule the demurrer and enter judgment for the plaintiff granting the writ as prayed for.

Smith, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer and enter judgment for the plaintiff as prayed for in its petition.

McFarland, J., Henshaw, J., Temple, J.

Hearing in Bank denied.

[S. F. No. 1864. Department Two.—December 4, 1901.]

**BUSH & MALLETT COMPANY, Appellant, v. LOUIS
HELBING et al., Respondents.**

FRAUDULENT CONVEYANCE—UNRECORDED DEED OF GIFT TO WIFE—FRAUD UPON SUBSEQUENT CREDITORS OF HUSBAND.—A deed of gift by a husband to his wife, which was fraudulent in its inception, and was made and left unrecorded for the express purpose of defrauding his subsequent creditors, by obtaining future credit upon the property as his own, is void as to subsequent creditors so defrauded.

ID.—TEST OF INVALIDITY—FRAUD OF GRANTOR—INNOCENCE OF GRANTEE IMMATERIAL.—The test of the invalidity of such deed of gift is the fraudulent motive on the part of the grantor; and the innocence or want of knowledge of the fraud on the part of the grantee is immaterial. The grantee, however innocent, cannot retain the fruits of a voluntary fraudulent transfer.

ID.—EVIDENCE—ACTS AND DECLARATIONS OF GRANTOR AFTER DEED, AND BEFORE RECORD—ABSENCE OF NOTICE BY GRANTEE.—In an action by a creditor, who relied upon the possession and apparent ownership of the husband in contracting for materials to improve the property while the deed to the wife remained unrecorded, evidence is admissible to show that after the transfer, and before the record of the deed, the husband had supervision and charge of the property as his own, and exercised acts of ownership over the same in his own name, and showed the property to the plaintiff, and told him that he owned it, and that the wife told no one about the deed until the day before it was recorded.

ID.—ABSENCE OF RECORD A BADGE OF FRAUD.—The fact that the deed was kept secret and not recorded, in such a case as this, is a very potent badge of fraud.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Whitworth & Shurtleff, B. S. Gregory, and Walter H. Linforth, for Appellant.

Charles S. Peery, A. E. Bolton, and R. Percy Wright, for Louise Helbing, Respondent.

Fred J. White, for Louis Helbing, Respondent.

COOPER, C.—This action was brought by plaintiff, as a creditor, to set aside a deed made by defendant Louis Helbing to defendant Louise Helbing, his wife, upon the ground that said deed was fraudulent and void as to plaintiff. Judgment was entered in favor of plaintiff against defendant Louis, and against plaintiff in favor of defendant Louise. Plaintiff appeals from the judgment in favor of defendant Louise and from the order denying a new trial. The deed was made May 15, 1893. Plaintiff was not then a creditor, but became a creditor of defendant Louis in October, 1895. The deed so made to Louise was a voluntary conveyance, executed as a deed of gift. During the month of October, 1895, before the deed was recorded, and while defendant Louis was the apparent owner of the property, plaintiff sold and delivered to him mantels, tiles, and grates, of the value of \$525, to be used, and which were used, in the repair and improvement of the building upon the said premises. The deed was not placed of record until December 11, 1895, and plaintiff did not know of such deed until after it had so furnished the said materials. It does not appear that defendants, or either of them, ever told any one about the deed, or that it was ever known, by any third party, to have been made until after it was recorded.

The complaint alleges that the deed was made with a fraudulent intent as to creditors and as to subsequent creditors, and that it was agreed that it should not be recorded, so that defendant Louis could obtain credit upon his apparent ownership of the property; that in pursuance of said agreement the making of the deed was kept secret, and that defendant Louis continued in the possession and use of the property, in the same manner as he had done before the deed was made. One of the main questions in the case is as to whether or not such deed is void as to subsequent creditors. The general rule is, that a deed of gift is valid, if the grantor was not indebted at the time he made it, or had ample means outside of the property conveyed with which to pay his indebtedness. This is so held for the reason that a man's property is his own, and he has the right to give it away if he so desires. If it be made while the grantor is free from debt, or while his solvency is not questioned, and he has ample means, after so deeding part of his property to meet all his obligations, it can injure no one, and it is not the business of any one except the grantor and

grantee. To this rule there is a well-known exception. This exception is, that a deed of gift, fraudulent in its inception, and made with an intent to enable the grantor to defraud future creditors, is void. A creditor has the right to believe that his debtor has dealt fairly with him, and if in view of future indebtedness, and secretly, without the knowledge of the creditor, the debtor makes a fraudulent conveyance of his property, upon which he knows his contemplated creditor relies, or has a right to rely, this is actual fraud, and renders the conveyance void.

This is a well-settled rule both in England and in this country. (Wait on Fraudulent Conveyances, secs. 96 et seq.; Bump on Fraudulent Conveyances, 4th ed., sec. 293; *Burdick Gill*, 7 Fed. Rep. 669; *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 1; *Graham v. La Crosse etc. R. R. Co.*, 102 U. S. 153; *Lyman v. Cessford*, 15 Iowa, 232; *Savage v. Murphy*, 34 N. Y. 507;¹ 14 Am. & Eng. Ency. of Law, 2d ed., p. 250, and notes.) Therefore, while the evidence would have to be such as to show that the deed was fraudulent in its inception, and while the burden of proof would be upon the creditor alleging fraud, nevertheless the fraud, when established, would make the deed void. In this case, the court below held that the evidence was sufficient to show that a fraud was contemplated by the grantor; that the deed was made by him with a fraudulent intent on his part.

At the close of the evidence the learned judge remarked: "There is no doubt a fraud was worked upon this plaintiff by this man; it is an out-and-out fraud on his part, but the wife cannot be shown to have any connection with it." The judge then directed the jury to bring in a verdict in favor of plaintiff against defendant Louis, and a verdict against plaintiff in favor of defendant Louise. It is evident that the court proceeded upon the theory that the deed was not fraudulent as to the defendant Louise, unless it had been shown that she intended the fraud and was a party thereto. In this view of the law the court was in error. A deed of gift made by the grantor for the purpose of defrauding his creditors is none the less fraudulent because the grantee took no part in the fraud. Such grantee is not a purchaser for value, and, being the party benefited by a gift, receiving that for which nothing has been paid, is not in a position to

¹ 90 Am. Dec. 733.

claim the benefit of a conveyance made for the express purpose of defrauding creditors. A man must be just before he is generous. If he makes a deed of gift to his wife, it must be with no fraudulent purpose, and openly, and under such circumstances that the law will impute no fraud as to his conduct. If it were always necessary to show that the grantee intended the fraud, it would be difficult, and in most case impossible, to produce evidence sufficient to set aside such conveyance. It is well settled that it is the motive of the grantor, and not the knowledge of the grantee, that determines the validity of the transfer. The grantee, however innocent, cannot retain the fruits of a voluntary fraudulent transfer. (*Swartz v. Hazlett*, 8 Cal. 128; *Lee v. Figg*, 37 Cal. 336;¹ *Peek v. Peek*, 77 Cal. 111;² Bump on Fraudulent Conveyances, sec. 239.)

The plaintiff offered to prove that after the transfer, and before the deed was recorded, the defendant Louis had supervision and charge of the property as his own; that he had the buildings thereon insured in his own name; that a loss occurred by fire, and he made the proof in his own name, in which he stated that he was the sole owner, and collected the insurance, giving the receipt in his own name; that he showed plaintiff the property, and told plaintiff that he owned it; that defendant Louise knew of the fire, that the buildings were insured in the name of her husband, and that he collected the insurance, and appropriated it to his own use, that she never told any one about the deed except one man, and that just the day before it was recorded. The court sustained defendants' objection to all such testimony, and plaintiff excepted. In this the court was in error. The evidence was offered for the purpose of showing that the vendor, after making the deed, still retained possession of the property, and his acts and declarations as to the character of his possession after the sale, while he remained in the possession thereof. Such evidence, in cases of actual fraud, is generally admissible, and particularly here, where the defendant Louis was the owner of the record title thereto, purchasing materials for improving it, and the making of the deed was kept secret, the knowledge thereof resting solely in the breast of husband and wife.

It is said in Wait on Fraudulent Conveyances (3d ed., sec.

¹ 99 Am. Dec. 271.

² 11 Am. St. Rep. 244.

279): "As proof of the continued possession of the vendor is competent evidence to impeach the supposed transfer, it would seem to follow that any acts or declarations of the possessor while so retaining the property must also be competent as characterizing his possession. So long as the debtor remains in possession of property which once belonged to him, and which his creditor is seeking to condemn as fraudulently conveyed, the *res gestae* of the fraud, if any, may be considered as in progress, and his declarations, though made after he has parted with the formal paper title, may be given in evidence for the creditor against the claimant, by reason of the continuous possession which accompanied them." The rule as stated in the text is supported by numerous decisions. (*Murphy v. Mulgrew*, 102 Cal. 552;¹ *Jones v. Simpson*, 116 U. S. 611; 14 Am. & Eng. Ency. of Law, 2d ed., p. 497; Bump on Fraudulent Conveyances, 4th ed., sec. 600; *Cahoon v. Marshall*, 25 Cal. 202; 1 Greenleaf on Evidence, sec. 109; *Adams v. Davidson*, 10 N. Y. 312.)

The court below was of the opinion that defendant Louise must have been shown to have intended the fraud and to have been connected with it. If this were true as a proposition of law, her intention might be inferred from her conduct and all the circumstances of the case. It is well said by Wait in his work on Fraudulent Conveyances (sec. 281): "In litigations of the class under consideration, great latitude should undoubtedly be allowed in regard to the admission of circumstantial evidence for the purpose of proving participation in manifest fraud. Objections to testimony as irrelevant are not favored in such cases, since the force of circumstances depends so much upon their number and connection. The evidence should be permitted to take a wide range, as in most cases fraud is predicated on circumstances, and not upon direct proof." And this is the well-established rule. (Bump on Fraudulent Conveyances, sec. 590; 14 Am. & Eng. Ency. of Law, 2d ed., p. 498, and cases cited.)

In this case, the deed was made without consideration; the grantor continued to deal with the property as before; the deed was kept secret, and not placed of record; when the wife was called upon to testify, the husband objected; the materials went into her property with her knowledge, and

¹ 41 Am. St. Rep. 200.

with no statement to plaintiff as to her title. All these matters might be true, and yet the deed might have been made with no intent to defraud. But the circumstances certainly are such as to call for a full, fair, and complete explanation. The burden was shifted upon the defendant to show that the transaction was honest and with no fraudulent purpose.

The fact that a deed is kept secret and not recorded is a very potent badge of fraud. In *Francis v. Lawrence*, 48 N. J. Eq. 511, the wife retained a deed, and the husband obtained credit by representing that he was the owner of the house and lot conveyed. In speaking of the transaction the court said: "At the time of these representations, except the first, his wife was in possession of a conveyance of the property from him to his brother-in-law, for the purpose of vesting the title in her name. The deed was not delivered to the grantee, and not placed upon the record, but was held by the wife, and the husband was thus enabled to trade upon the false credit which he acquired by being the apparent owner of the property, while the deed was ready to be put upon the record at a moment's notice. . . . This transaction cannot be regarded in any other light than as a fraud upon the creditors."

Mr. Justice Bronson said, in *Van Wyck v. Seward*, 18 Wend. 398: "I have never been able to discover the principle upon which a title acquired by mere gift should, under any circumstances whatever, be deemed superior to the claim of the creditor to be paid his debt."

While the language of the learned judge in the above case lays down the rule too broadly according to the current of authorities, yet there is much reason in it. Surely, it is not saying too much to say that a wife should not knowingly, by accepting a fraudulent conveyance without consideration, and keeping it secret, be allowed to aid and assist her husband in procuring credit upon holding himself out to the world as being the owner of the property described in the deed. Respondent earnestly contends that a different rule is laid down in *Emmons v. Barton*, 109 Cal. 663. It was there said that declarations of the husband, after conveyance to the wife, are not admissible, even where the husband remained in possession. But the record shows that the conveyance in that case was recorded the same day it was made. There was nothing secret about it, and the remarks in the opinion were made with reference to the facts of the case under discussion. This is evident from

reading the opinion, and the writer, in support of the statement, refers to Bigelow on Fraud. It is said by Bigelow (vol. 2, p. 365): "The case would be different, however, if the creditors were induced to give credit on the faith of the ownership of the possessor, where the real owner has neglected to put his deed on record. It is enough to bar the claim of the owner that his neglect or (to avoid any possible misunderstanding) his omission has contributed to the deception of the creditors."

It follows that that portion of the judgment in favor of defendant Louise Helbing should be reversed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion that portion of the judgment in favor of defendant Louise Helbing is reversed. Henshaw, J., McFarland, J., Temple, J.

Hearing in Bank denied.

[Crim. No. 665. Department Two.—December 4, 1901.]

THE PEOPLE, Respondent, v. ROBERT BISHOP, Appellant.

CRIMINAL LAW—BURNING HOUSE TO DEFRAUD INSURERS—EVIDENCE—HOLES BORED IN FLOOR—ADMISSIBILITY OF BRACE.—Upon the trial of a defendant charged with burning his dwelling-house with intent to defraud the insurers of the property, where it was proved that after the fire was extinguished upon the lower floor, holes were found bored in the upper floor, with coal-oil poured around them and into them, a brace found in a cupboard in one of the upper rooms, on the day after the fire, by a witness, who was put in charge of the house by the foreman of the fire department, shortly after the fire, is admissible as a circumstance tending to show that defendant had the means at hand with which to bore the holes found in the floor.

ID.—TESTIMONY OF CHIEF OF FIRE DEPARTMENT—PUTTING PERSON IN CHARGE OF DWELLING—UNIMPORTANT EVIDENCE.—Testimony of the chief of the fire department, that he put one of his men in charge of the building after the arrest of the defendant, and charged him not to allow any one to enter unless the chief was present, if not

admissible, is too unimportant to warrant a reversal. The only matter of importance is what the person put in charge actually did.

ID.—ODOR OF COAL OIL UPON CLOTHES—RULING WITHOUT INJURY.—

Where it was proved that, at the time of the fire, coal-oil was found scattered around the floors and articles of furniture in different parts of the house, under circumstances pointing to guilty knowledge on the part of the defendant, evidence was admissible to show that there was odor of coal-oil on the clothes of the defendant when he was arrested; and a further statement of the witness, that there was still a slight odor of coal-oil on some of the garments brought into court and identified, which the court excluded from evidence, is without injury, where the defendant did not move to strike out such statement.

ID.—EXAMINATION OF WITNESSES BY COURT—REMARKS AND SUGGESTIONS—ABSENCE OF OBJECTION OR EXCEPTION—APPEAL—PRESUMPTION.—Where the court cross-examined the defendant and other witnesses of its own motion, and made remarks and suggestions, to none of which acts of the court objection was made, or any exception taken by the defendant, it is too late upon appeal to raise a question as to such matters; and where an objection was taken to the interruption of a witness by the court, and no exception was reserved, it must be presumed upon appeal that the defendant was finally satisfied that the court was right.

ID.—CROSS-EXAMINATION OF DEFENDANT—FORMER TESTIMONY—STEALING OF MONEY FROM VEST—HESITATION AND DIFFERENCE SHOWN BY RECORD.—Where the defendant upon examination in chief testified as to the stealing of money from his vest on the night of the fire, to raise an inference that the thief fired the house, it was competent to cross-examine him fully as to all the facts and circumstances attending the matter, and to show by comparison of his former testimony that his hesitation as to the facts appeared therein by question and answer, and that he testified with hesitation, and differently, at the first trial as to facts narrated by him at the last trial without hesitation. If his former hesitation had not appeared from the record, and his examination in chief did not show his demeanor at the first trial, his demeanor thereat could not be proved by him upon his cross-examination.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. W. E. Greene, Judge.

The facts are stated in the opinion.

A. L. Frick, and George D. Collins, for Appellant.

Tirey L. Ford, Attorney-General, and Henry A. Melvin, for Respondent.

CHIPMAN, C.—Defendant was convicted of the crime of unlawfully and maliciously burning and destroying his dwelling-house and certain of its contents, situate in the city of Oakland, with intent to defraud the insurers of said property, and was sentenced to imprisonment for five years in the state prison.

It is not claimed that the evidence did not justify the verdict. A new trial is asked on the ground of certain alleged errors committed by the court during the progress of the trial.

1. There was evidence that in each of two of the rooms in the upper portion of the house, in one of which defendant slept, there were two or three holes bored in the floor, and coal-oil was found around them and poured into them. This discovery was made immediately after the fire had been extinguished in the lower story; three of these holes appeared to have been recently bored; one of the members of the fire department was put in charge of the house at the time of the fire and continued in charge for several days. Called as a witness for plaintiff, he was shown a brace, which he identified. He testified that he found it in a small drawer in a cupboard in one of the rooms, and that he first saw it the day after the fire; it was offered in evidence, to which defendant objected as "incompetent, immaterial, and too remote." Witness testified that from the time he took charge there was no opportunity for any one to have put the brace where he found it. He was very fully-cross-examined on the matter, from which it appeared that during the fire and the successful efforts to extinguish it other persons might have been in and out of the house, assisting the department; that he took charge of the house by order of the foreman of the fire department, about half-past three o'clock in the morning, the fire having occurred about three o'clock, and that up to the time he found the brace he did not believe any person could have gone into the house and placed it there without his knowing it. While some of these facts came out after the objection was made, there were sufficient facts to warrant the admission of this tool as a circumstance tending to show that defendant had the means at hand with which to bore the holes found in the floor.

2. At the time of the fire, coal-oil was found scattered around on the floors and articles of furniture in different parts of the house, and under circumstances pointing to

guilty knowledge on the part of defendant. A police-officer took defendant and his son into custody, and carried them in the patrol-wagon to the police station, and there searched them. Defendant's clothing was removed from his person, and some of his garments emitted an odor of coal-oil. This officer was called as a witness and identified this clothing, and it was admitted, under some cautionary restrictions of the court, and the witness testified that there was still a slight odor of coal-oil on some of the garments. On cross-examination, defendant's counsel asked the witness if "he knew whether or not these garments have been since the first trial of this case brought into contact with kerosene or coal-oil cans." The court sustained an objection, as not proper cross-examination. After some effort of the prosecution to show that the garments were not where they could have been tampered with, the court stated that it was no use to go on with the proof; that as to this clothing, it had been lying around the court-room, and accessible to men going in and out. If defendant had felt prejudiced by the ruling, he could have had the evidence stricken out as to the odor then on the clothes. He seemed to be content with the statement of the court, and conceding error in the ruling, it was without injury. Evidence as to the odor on the clothing when defendant was arrested was clearly admissible.

3. The chief of the fire department was allowed by the court, over the objection of appellant, to testify that he put one of his men in charge of the building after appellant's arrest, as above stated, and told him not to allow any one to enter unless he, the chief, was present. If it be conceded that this testimony was improperly admitted, still it was too trivial to warrant a reversal for the error in admitting it. The only important thing in connection with the matter was what the person put in charge actually did.

4. Certain errors are assigned, arising out of the court's having cross-examined the defendant after the people and defendant were through with the witness; also, in remarking, when he overruled defendant's objection to a question put to a witness on re-cross-examination, "as a matter of discretion I will allow it for the ends of justice"; also, for cross-examining a character witness, whom the prosecution had not cross-examined, in a manner calculated to convey to the jury the impression that the court was not satisfied with the answers of witness; also, in cross-exam-

ining a witness as to what he said at a former trial, and in suggesting to the district attorney that he examine the transcript of the witness's former testimony; also, in asking counsel for defense if he was not putting a "catch-question" to a certain witness. In none of the instances named did defendant object at the time or take any exception. It is now too late to raise a question as to the matters complained of. If the court asks an improper question, or otherwise commits some supposed infraction of the defendant's rights, it is the duty of counsel then and there to make known his objection and reserve his exception. We cannot otherwise notice alleged errors of the court committed on its own motion, any more than can we notice errors in rulings on the conduct of the case by the people's attorney. It is sometimes a disagreeable duty for counsel to call attention to objectionable remarks of the court in the course of the trial, or to its voluntarily propounding questions to witnesses, or to its criticisms of the conduct of counsel, but fairness to the trial judge demands that his attention be at once called to anything he may do or say, and to reserve an exception should the matter, after such notice, be so left as, in the judgment of the complaining counsel, to prejudice the rights of his client.

In one instance, not alluded to above, the court interrupted a witness, called to prove the good character of defendant, and proceeded to state how general reputation is arrived at. The statement of the court was objected to by defendant, but he did not reserve an exception. We must presume, in such case, that defendant was finally satisfied that the court was right, and in this particular instance defendant got from the witness all he desired,—the witness answering that he knew the general reputation of defendant, and that it was good.

5. In defendant's brief it is stated that the court erred in overruling certain questions asked of defendant, "set forth in defendant's ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth specifications of error."

The learned counsel for defendant in his brief says that some of the examination referred to may have been responsive to the examination in chief, but that some was not; that some portions, at least, "gave both the statements

made by the counsel in the form of questions, at a former examination, and the answers given by defendant upon such former examination that were in no wise proper cross-examination."

It is quite impossible for us to determine, after an examination of many pages of the record, upon what particular specifications defendant relies, some of which he concedes may not be well grounded. The principal point relied on seems to be that the court permitted the district attorney to read portions of defendant's testimony, given at a former trial, which were not in conflict with his testimony at the present trial on material points, and bore no relation to his testimony in chief. (Citing *People v. Cole*, 127 Cal. 545; *People v. Gallagher*, 100 Cal. 466.) We are not aided by any reference of counsel to the pages of the record where such alleged violation of defendant's rights may be found, and on examination it appears that nearly all of the re-cross-examination went in without objection. In his brief, counsel calls particular attention only to specification 12, and here the objection seems to be more to a remark of the court in making its ruling than to the ruling itself, and as to the remark of the court, no objection was made or exception noted. The question itself was not so material as to have affected the minds of the jury; it was as to one of numerous incidents occurring at the fire, and as to defendant's conduct after he claims to have been aroused by the alarm; and besides, we do not think it was entirely foreign to anything he had testified to on his examination in chief.

6. On cross-examination of defendant, called as a witness in his own behalf, the following proceedings took place: By the district attorney. "Q. Upon the former trial of this case in January, was not the following question put to you? 'Q. How could you look into the vest for the \$160, and find it missing, if you did not know where the vest was hanging?' Was not that question put to you, Mr. Bishop, at the trial in January, and did not you hesitate for a considerable period of time,—hesitate to answer? and was not then the question put to you, 'Why do you hesitate?'" Defendant objected to the question, as not cross-examination, and on the further ground that it was "not proper cross-examination of this witness at this time to ask him whether or not he hesitated upon a cross-examination at some other trial of this case." The objection was overruled and defendant excepted. The witness answered,

"Yes, sir; I hesitated." Counsel then proceeded: "Q. Was that question put to you?—A. Yes, sir. Q. Did you then answer, 'A. Well, I must have found the vest, or else I could not have put my hand in the pocket'?—A. I don't remember. I think I can safely say that I did not so testify."

The witness had testified that when he went to bed, the night of the fire, he put his vest under his pillow, and that he had \$160 paper money—\$10 bills—screwed up in the vest; that when he was aroused, he felt under the pillow, and the vest was gone; that it was dark, and he "grabbed up the clothes that were on the floor and ran downstairs. But I put my hand, first of all, under the pillow, and found that my vest was gone." He went downstairs with the clothes he had gathered up, being clad only in his drawers, undershirt, and white shirt. He went back to his sleeping-room and found his vest, and discovered that his money was gone. The purpose of this testimony was to show that he had been robbed, and from this circumstance to raise the inference that some other person—probably the thief—had fired the house. It was on this branch of the case he was closely cross-examined, and having made statements as to where he found the vest, and his statement of the circumstances under which he found it differing somewhat from his statements at the former trial concerning the same matter, the district attorney introduced his former testimony for the purpose of impeachment, and to show that the witness was not to be believed as to this theory advanced as a defense. It is true, the witness had not been examined in chief at the present trial as to his conduct or manner on the witness-stand at the former trial when he was testifying as to his loss of money. But the subject-matter was gone into in the examination in chief, and the loss of his money and the displacement of his vest came out as furnishing a probable explanation for the burning of the house. It was competent to cross-examine fully as to all the circumstances attending so important a matter, and to show, by comparison of his former testimony about that matter with that he was then giving, that he testified with hesitation, and differently, at the first trial, as to facts which were narrated by him at the last trial without hesitation. The record of the former trial showed that he answered after hesitation, for the question was put to him, before he answered, "Why do you hesitate?" And he answered at the last trial that he hesitated.

This circumstance of his hesitating was a part of the question and answer, and so appears by the transcript of his former testimony, and became a part of it, and could properly be brought to the attention of the jury. If the witness, in answering at the last trial, had desired to explain why he hesitated when the matter was first gone into, he had an opportunity to do so. Whether generally and in ordinary cases the attending conduct, appearance, and manner of a witness when he made the impeaching answer can be shown, in addition to the answer itself,—i. e., whether anything more than the fact that certain questions were put to him and certain answers given,—can be allowed as cross-examination, raises a question which is not necessarily presented here. The attending circumstance of the witness's hesitation formed part of his answer, as shown by the record, and was therefore admissible.

Nothing in this opinion is intended to be interpreted as relaxing the rule laid down by this court as to the right of a defendant to be protected from an improper cross-examination which would tend to incriminate him. Section 1323 of the Penal Code provides, in part, that "if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." This provision had very careful examination and interpretation in *People v. Arrighini*, 122 Cal. 121. It may be conceded that as defendant was not interrogated in his examination in chief, at the last trial, as to his demeanor when on the witness-stand at the first trial, if the record of his testimony at the first trial had been silent as to his demeanor when testifying about the particular matter the subject of his cross-examination at the last trial, he could not be made to state his conduct and demeanor at the former trial as an independent fact, for it might have been such as to imply guilt. It may be also conceded that even if such circumstance could be shown by the prosecution by other witnesses, called for that purpose, still, it could not be shown by a cross-examination of the defendant himself. But, as we have seen, the record of the former trial shows that his demeanor in answering a particular question became a part of his answer and inseparable from it,—in a sense, was *res gestae*,—and could be shown by the witness himself as part of his former answer.

Discovering no prejudicial error in the proceedings, it is advised that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed. Henshaw, J., McFarland, J.

TEMPLE, J., concurring.—I concur in the judgment, but in my opinion the examination of the defendant as to his demeanor while testifying upon a former trial ought not to have been allowed. It was not, however, as to a matter of much importance, and I think it could not have prejudiced the case of defendant.

As to numerous remarks made by the judge during the trial, I wish to say, that, in my judgment, the best plan is to let the prosecuting attorney attend to the case of the people. The judge should be indifferent, except in a desire to conduct the trial according to the rules of law, and he serves the cause of justice best when he is so. In this case I have some doubt as to what should be done, but am disposed to yield to the more positive convictions of my associates that there was no substantial injury.

Hearing in Bank denied.

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ABATEMENT.

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ACCOUNTING. See Mortgage, 10, 11; Trust.

ADVERSE POSSESSION. See Fraudulent Conveyance, 7.

AGENCY. See Corporations, 5, 6, 11-13; Fraudulent Conveyance, 9.

APPEAL.

1. **PLEDGE OF LIFE INSURANCE POLICY—FORECLOSURE BY PLEDGEE—APPEAL BOND—STAY OF EXECUTION—SUPERSEDEAS.**—Upon appeal from a judgment in favor of a pledgee of a life insurance policy foreclosing the lien of the pledge, the ordinary bond upon appeal in the sum of three hundred dollars is sufficient to stay execution; and a *supersedeas* will issue to prevent a sale of the policy under the decree, pending the appeal. (*Commercial and Savings Bank of San Jose v. Hornberger*, 90.)
2. **DANGER OF LOSS OF POLICY—NATURE OF SECURITY—KNOWLEDGE OF PLEDGEE.**—The danger of the loss of the policy, pending the appeal, by a violation of its terms by the insured, cannot operate to change the statutory rule governing a stay of proceedings upon appeal. Such danger is inherent in the nature of the security, and the pledgee, by accepting it, is chargeable with knowledge of its condition. (*Id.*)
3. **DISMISSAL—FAILURE TO FILE UNDERTAKING IN TIME.**—An appeal will be dismissed for failure actually to file the undertaking on appeal in the county clerk's office within five days after service of the notice of appeal. (*Hoyt v. Stark*, 178.)
4. **INSUFFICIENT FILING—DELIVERY OUT OF CLERK'S OFFICE.**—The delivery of the undertaking to a deputy clerk, at a place other than the clerk's office, after office hours, on the last day for filing, which he then marked as filed as of that day, but which did not reach the clerk's office and was not entered as filed until the following day, was not sufficiently filed to sustain the appeal. (*Id.*)
5. **RIGHT AND DUTY OF ADVERSE PARTY—WATCHING OF CLERK'S OFFICE.**—It is the duty of the adverse party to watch the clerk's office not

APPEAL (Continued).

more than five days for the undertaking, to the sufficiency of the sureties upon which he has a limited time in which to object. But if the undertaking has not reached the clerk's office within five days after service of the notice of appeal, the adverse party has no further duty to perform. (Id.)

6. **PRESENTATION AT CLERK'S OFFICE FOR FILING—NEGLECT OF MINISTERIAL DUTY.**—The presentation of the undertaking for filing at the clerk's office within proper time is essential. If this is done, the neglect of the ministerial duty of the clerk to enter the filing cannot prejudice the appellant. But where the appellant does not comply with the law on his part, and delivers the undertaking out of the clerk's office, the neglect of the deputy, who has received it and marked it filed, to enter it in the clerk's office on the same day, cannot relieve the appellant. (Id.)
7. **FRACTION OF DAY, WHEN DISREGARDED.**—If the appellant had procured the deputy to accompany him to the clerk's office after office hours, and had there presented the undertaking for filing, the fraction of the day would in such case, be disregarded. (Id.)
8. **MOTION TO DISMISS—SERVICE OF NOTICE BY MAIL—SUFFICIENCY OF PROOF.**—Upon motion to dismiss an appeal for failure to serve the notice of appeal upon all of the adverse parties, where appellant submitted an affidavit, stating in positive terms service of the notice upon their attorney by mail, and the existence of the conditions upon which such service was permissible, and also stating that, after the service, respondents' attorney admitted receipt of the notice through the mail, such statements will prevail over any mere inference to the contrary, from facts set forth in an affidavit of respondents' attorney, including a statement of mere want of recollection by him of the admission that the notice was received. (*Brandenstein v. Johnson*, 102.)
9. **ORDER SETTLING RECEIVER'S ACCOUNT—FINAL JUDGMENT.**—An order settling the accounts of a receiver, and directing the payment of his compensation by one of the parties, although made before there has been a final judgment in the action in which he was appointed, is a final determination of the rights of the parties to the matter there before the court, and an appeal therefrom, as from a final judgment, may be taken within six months after its entry. (*City of Los Angeles v. Los Angeles City Water Company*, 121.)
10. **DISMISSAL—FAILURE TO FILE UNDERTAKING IN TIME.**—An appeal will be dismissed for failure to file the undertaking on appeal within five days after proper service of the notice of appeal. (*Rose v. Mesmer*, 459.)
11. **SERVICE OF NOTICE OF APPEAL—ATTORNEYS OF RECORD—VOID SECOND SERVICE UPON PARTY.**—Where the notice of appeal was served upon the attorneys of record of a respondent more than five days before the filing of the undertaking upon appeal, a second service, made personally upon such respondent, who had only appeared by

APPEAL (Continued).

his attorneys, is a mere nullity, and cannot avail to postpone the time required by law for the filing of the undertaking. (Id.)

12. **MOTION TO DISMISS APPEAL—FAILURE TO FILE TRANSCRIPT—CERTIFICATE OF CLERK—AFFIDAVIT FOR RESPONDENT.**—A motion to dismiss an appeal for failure to file the transcript within time must be heard upon the certificate of the clerk, and an affidavit for the respondent cannot be considered for the purpose of determining the character of the records kept by the clerk, or from what order the appeal was taken. (*Chevassus v. Burr*, 434.)
13. **INSUFFICIENT SHOWING AS TO ATTORNEYS—SERVICE OF NOTICE OF APPEAL.**—Where the certificate of the clerk fails to state, and it does not otherwise appear, who were the attorneys for the respective parties, or who was the attorney by whom the notice of appeal was given, the showing upon that subject is insufficient to sustain the motion to dismiss the appeal for failure to file the transcript. (Id.)
14. **SERVICE OF MOTION UPON EXECUTRIX NOT SUBSTITUTED—ESTATE OF APPELLANT NOT BROUGHT IN.**—Where the action was commenced by an executor of the will of a deceased person, and the appellant was substituted for such executor, and died after the appeal was taken, an acknowledgment of service, made by his executrix, of the motion to dismiss the appeal, without any substitution of such executrix, or any showing that she represented the original estate, is insufficient to bring the original estate interested as appellant before the court. (Id.)
15. **MOTION TO DISMISS—EXTENSION OF TIME TO FILE UNDERTAKING—POWER OF COURT.**—The court or judge has power to extend the time allowed by statute in which to file the undertaking on appeal, and the fact that it was not filed until thirty days after the service of the notice of appeal is not ground for a motion to dismiss the appeal, where it appears that it was filed within the time properly allowed by order of the judge of the court. (*Schloesser v. Owen*, 546.)
16. **PROOF OF SERVICE OF NOTICE—AMENDMENT OF DEFECT.**—A defect in proof of the service of the notice of appeal may be supplied by leave of the court at the hearing of a motion to dismiss the appeal. (Id.)
17. **JUDGMENT FOR COSTS—TEST OF JURISDICTION—AMOUNT CLAIMED IN COMPLAINT.**—In an action in the name of the people upon the official bond of a county treasurer, the amount claimed in the complaint is the test of jurisdiction; and where that amount was sufficient to give jurisdiction to the superior court, and to this court upon appeal, and the action was wrongfully dismissed on the ground of want of authority of the district attorney to prosecute it, a judgment rendered against the district attorney for costs in the sum of \$18.75 was part of the general judgment, which this court

APPEAL (Continued).

has jurisdiction to review and reverse upon appeal. (*People v. Madden*, 611.)

18. **STALENESS OF DEMAND NOT SHOWN.**—Where the complaint does not show a stale demand, and there is nothing in the findings or conclusions of the court to support such a defense, the point that the plaintiff's demand is stale cannot be sustained upon appeal. (*Hamilton v. Hubbard*, 603.)
19. **REFUSAL TO DISMISS ACTION—ORDER NOT INVOLVING MERITS.**—An order refusing to dismiss an action is not itself appealable, and where it does not involve the merits of the action, or necessarily affect the judgment rendered therein, or affect any substantial rights of the defendant, it will not be reviewed upon appeal from the judgment, and cannot constitute such error as to justify a reversal of the judgment. (*Garthwaite v. Bank of Tulare*, 237.)
20. **DEMURRER—MOTION TO DISMISS—DISCRETION.**—Where a demurrer was interposed to the complaint, and a motion was made to dismiss the action for want of prosecution, it was in the discretion of the court to refuse to hear the motion to dismiss, and to hear the demurrer. Its determination to hear the demurrer was, in effect, a denial of the motion to dismiss, and the subsequent refusal of the court to allow the motion to dismiss to be renewed was matter of discretion, which is not reviewable upon appeal. (*Id.*)

See Attorney at Law, 2, 3; Bond, 1, 4; Contract, 1, 2; Corporations, 1, 3; Divorce, 1, 2, 7; Election, 5; Estates of Deceased Persons, 15, 18; Findings, 1; Insane Persons, 8; Judgment, 1, 10, 12-14; Mandamus; New Trial, 2, 3, 7; Partition; Partnership, 4, 5.

ATTACHMENT.

1. **BOND TO RELEASE ATTACHED PROPERTY—JUDGMENT IN FAVOR OF OWNER AND AGAINST CO-DEFENDANT—LIABILITY OF SURETY.**—Under our statute, the condition of a bond given to release attached property requires the redelivery thereof to the sheriff, if the plaintiff recovers any judgment in the action, notwithstanding it appears that judgment was rendered in favor of the owner of the attached property, and against a co-defendant who had no interest therein; and in default of such redelivery, a surety on the bond is liable to pay the full value of the property to the plaintiff, not exceeding the amount of such judgment. (*McCormick v. National Surety Company*, 510.)
2. **OWNERSHIP OF ATTACHED PROPERTY IMMATERIAL TO SURETY.**—The actual ownership of the property attached is no concern of a surety on the bond to release the attachment. Whether it belongs to a third party, or for any legal reason is subject to attachment, is a question to be litigated between the plaintiff and the adverse claimant, and does not affect the express covenant of the surety to restore the property. (*Id.*)

ATTORNEY AT LAW.

1. **FORECLOSURE OF MORTGAGE—STIPULATION FOR DEFAULT JUDGMENT—AUTHORITY OF ATTORNEY—PRESUMPTION.**—Where it appears that an attorney for the defendant in an action to foreclose a mortgage was employed to secure delay, and after securing all the delay practicable, waived further right to answer, and stipulated for a default judgment, it must be presumed that such stipulation was within the scope of his authority. (*Security Loan and Trust Company v. Estudillo*, 166.)
2. **REFUSAL TO SET ASIDE DEFAULT—PRESUMPTION UPON APPEAL—CONFLICTING EVIDENCE.**—Upon appeal from an order refusing to set aside the judgment by default, all presumptions are in favor of the order, and where the evidence was conflicting as to the authority of the attorney to stipulate for the judgment, the order must be affirmed. (*Id.*)
3. **AFFIDAVITS OF PLAINTIFF—IMMATERIAL AFFIDAVIT OF MERITS.**—Affidavits for the plaintiff were properly read on the motion to set aside the default, for the purpose of showing that the default should not be opened. If the stipulation for the default was authorized as found by the court, the defendant's affidavit of merits was immaterial. (*Id.*)
4. **EVIDENCE OF AUTHORITY—TESTIMONY OF ATTORNEY—PRIVILEGED COMMUNICATION.**—The testimony of the attorney was admissible to show his authority to stipulate for the default. His employment was not a "privileged communication," within the meaning of the statute. (*Id.*)

See *Estates of Deceased Persons*, 11-14.

BAILMENT. See *Warehouseman*.

BALLOTS. See *Election*.

BANKS. See *Negotiable Instruments*, 6-12.

BILL OF EXCEPTIONS.

1. **MANDAMUS—SETTLEMENT OF BILL OF EXCEPTIONS—DISMISSAL OF MOTION FOR NEW TRIAL—FAILURE OF MOVING PARTY—CONFLICTING EVIDENCE.**—*Mandamus* will not lie to compel the trial judge to settle a bill of exceptions upon an order dismissing a motion for a new trial, where it was within the province of the judge to dismiss the motion and to refuse to settle the bill on the ground that the bill and amendments were not presented to the clerk for the judge within the statutory period, and that the evidence on the question of such failure is conflicting. (*Kowalsky v. Kerrigan*, 590.)
2. **PROVINCE OF TRIAL JUDGE.**—It is the province of the trial judge, in the first instance, to determine all questions of fact which arise in connection with the settlement of a statement or bill of exceptions, and his determination of the facts will not be disturbed in

BILL OF EXCEPTIONS (Continued).

this court, except upon a clear showing of error, mistake, or abuse of discretion. (Id.)

3. **MANDAMUS—SETTLEMENT OF BILL OF EXCEPTIONS—AGREED CONTINUANCE OF HEARING—PRESENTATION OF BILL AND AMENDMENTS.**—Where the hearing of the settlement of a proposed bill of exceptions and the proposed amendments thereto, which were rejected, was duly noticed, agreed continuances of the hearing of such settlement, by stipulation of the parties, were, by implication, continuances of the presentation of the bill and amendments to the judge; and where the judge refused at the hearing to settle the bill, because presented only at the hearing, and not within the ten days first noticed, *mandamus* will lie to compel such settlement. (Boyer v. Burnett, 481.)

BILLS AND NOTES. See Negotiable Instruments.

BONA FIDE PURCHASER.

1. **DIVORCE—DIVISION OF COMMUNITY PROPERTY—TENANCY IN COMMON—UNRECORDED SEPARATION AGREEMENT.**—A *bona fide* purchaser of an undivided half interest in community real estate, awarded by a decree of divorce to the wife, as a tenant in common with the husband, is protected as against an unrecorded agreement for separation made between the husband and wife, which it was agreed should control all property rights in case of divorce, where the purchaser had no actual or constructive notice of such agreement. (Schumacher v. Truman, 430.)
2. **POSSESSION OF TENANT OF HUSBAND—POSSESSION OF WIFE—PRESUMPTION—PURCHASER NOT PUT UPON INQUIRY.**—The possession of a tenant of the divorced husband after the decree of divorce must be presumed to be the possession of the divorced wife, as a tenant in common with him, and is consistent with and not adverse to the record title of the divorced wife, and did not put the purchaser from her upon inquiry as to any equitable rights of the divorced husband under the unrecorded agreement. (Id.)
3. **POSSESSION, WHEN AND WHEN NOT NOTICE TO PURCHASER—INQUIRY, WHEN NOT A DUTY.**—The rule that one who purchases land, not at the time in the possession of the vendor, takes in subordination to the rights of third persons in actual possession, is subject to the qualification that the possession must be not only open and notorious, but also exclusive, and inconsistent with the record title. Inquiry does not become a duty when the apparent possession is consistent with the title appearing of record. (Id.)
4. **NEGLECTANCE OF HUSBAND—ESTOPPEL.**—The negligence of the husband in permitting the record title to the undivided one half of the community property to remain of record, and in failing to give record notice of any application to set aside the decree as against the wife, estops him from questioning the title of a *bona fide* purchaser claiming under the wife, who took her record title for full

BONA FIDE PURCHASER (Continued).

value without notice of any claim or action of the husband inconsistent therewith. (Id.)

See Trust, 1.

BOND.

1. **ACTION UPON STAY BOND—DISTRIBUTION OF ESTATE OF DECEASED OBLIGEE—COLLATERAL ATTACK.**—In an action upon a stay bond, given upon appeal in an ejectment suit to several obligees, one of whom had died, the distribution of the estate of the deceased obligee to plaintiffs cannot be collaterally attacked by the obligors, made defendants in the action. (Todhunter v. Klemmer, 60.)
2. **PROOF OF NON-PAYMENT OF BOND—ADMISSION OF PLEADING.**—The non-payment of the bond sued upon need not be proved, where it is alleged in the complaint and not denied in the answer. (Id.)
3. **EVIDENCE INADMISSIBLE UNDER PLEADINGS—OCCUPATION OF LAND BY DEFENDANT IN EJECTMENT—RECEIVER.**—Where the pleadings in the action upon the bond admitted the alleged occupation of the land by the defendant in the ejectment suit, and the alleged value thereof, evidence offered by the defendants to show the appointment of a receiver, and his possession of the land, is inadmissible under the pleadings. (Id.)
4. **JUDGMENT IN EJECTMENT—PRIOR DEATH OF CO-PLAINTIFF—JURISDICTION—JUDGMENT AND BOND UPON APPEAL NOT VOID.**—The fact that one of the co-plaintiffs in the ejectment suit died prior to the judgment rendered therein did not deprive the court of jurisdiction, nor render the judgment absolutely void; nor did it vitiate a bond given upon appeal in his favor as one of the co-plaintiffs. His name as obligee represented his executors or distributees as the real parties in interest. The undertaking necessarily followed the judgment, and was valid, both as against the obligors, and in favor of the executors or distributees of the deceased obligor named therein. (Id.)

See Attachment.

BOUNDARIES. See Public Lands.

BRIDGES. See Counties, 11, 12.

CHECKS. See Negotiable Instruments, 6-12.

CODES. See Statutes, 1.

COMMUNITY PROPERTY.

1. **HUSBAND AND WIFE—PRESUMPTION—BURDEN OF PROOF.**—All property acquired after marriage by either husband or wife, not included in the statutory exceptions, is presumed to be community property, and whether it has undergone changed conditions or not, the burden

COMMUNITY PROPERTY (Continued).

of proof is upon the party claiming it to be separate property, to establish that fact by clear and convincing evidence, and the separate property must be clearly traced and located, by plain and connected channels, and not by way of surmises and probabilities. (*Rowe v. Hibernia Savings and Loan Society*, 403.)

2. **CONSTRUCTION OF CODE—POWER OF MARRIED WOMEN—RULE AS TO COMMUNITY PROPERTY NOT AFFECTED.**—Section 575 of the Civil Code, providing that "married women and minors may, in their own right, make and draw deposits and draw dividends, and give valid receipts therefor," does not repeal or abrogate or in any way affect the rule established by section 164 of the Civil Code, concerning the community property of the husband and wife. (*Id.*)
3. **REPEAL BY IMPLICATION.**—The repeal of a law by implication is not favored; and it requires language of unmistakable meaning, or a direct statutory enactment, to accomplish a repeal. (*Id.*)
4. **DEPOSIT IN BANK BY WIFE—ACTION BY ADMINISTRATRIX AGAINST BANK—EVIDENCE—FORMER JUDGMENT IN FAVOR OF HUSBAND—ERROR WITHOUT PREJUDICE.**—In an action by the administratrix of the deceased wife to recover a deposit made in a bank in the name of the wife, evidence of a former judgment against the bank, in favor of the husband, is not admissible; but where the evidence is full as to the history of the account kept by the deceased wife, and sustains the findings that the money left in the bank was community property, the plaintiff could not be prejudiced by the admission of such judgment in evidence. (*Id.*)
5. **WILL OF WIFE NOT ADMISSIBLE EVIDENCE.**—The will of the deceased wife, disposing of the amount deposited in bank, together with other property, is not admissible in evidence against the defendant. Declarations in her will, made without the knowledge of her husband, were not competent proof that the property was her separate property. (*Id.*)
6. **TESTIMONY OF HUSBAND—IMPEACHMENT—REBUTTAL.**—Where the husband testified for the defendant that he did not know until after his wife's death that she had a bank account, testimony in rebuttal, relative to a statement made by him on the morning after her death, that she kept her own bank account, is not admissible as impeaching testimony, where no foundation was laid therefor, and plaintiff could not be prejudiced by a ruling excluding the evidence as rebuttal. (*Id.*)

See *Bona Fide Purchaser*; *Divorce*, 6-8; *Husband and Wife*, 1-3.

CONSTITUTIONAL LAW. See *Contempt*; *Counties*, 1-6; *Estates of Deceased Persons*, 7; *Insane Persons*, 6, 7; *License*, 2-5; *Mortgage*, 5; *Municipal Corporations*; *Place of Trial*; *Statutes*, 1; *Street-assessment*, 1, 14, 29.

CONTEMPT.

IMPRISONMENT FOR NON-PAYMENT OF RENT—CONSTITUTIONAL LAW.—

Rent due and unpaid constitutes a debt from the tenant to the landlord, and upon the tenant's refusal to pay it to a receiver, in pursuance of an order made in an action to foreclose a mortgage of the leased premises, the court has no authority to punish its non-payment by imprisonment for contempt. Such a proceeding is in contravention of section 15 of article I of the state constitution, forbidding the imprisonment of any person for debt in any civil action, except in case of fraud. (*Knutte v. Superior Court*, 660.)

CONTRACT.

1. **BUILDING CONTRACT FOR SCHOOLHOUSE—AGREEMENT FOR PAYMENT OF MATERIAL-MEN—LIEN UPON MONEY DUE—APPEAL OF CONTRACTOR.**—A building contractor, who agreed that money due for building a schoolhouse should be applied by the school district first to pay all claims for materials furnished, and that he should receive the residue only, cannot complain of a judgment properly rendered against himself in favor of material-men, merely because the amount is made by the judgment a lien and charge upon the unpaid moneys in the hands of the school district and its trustees, from which no appeal is taken by them. The contractor cannot avail himself of technical error against defendants not appealing. (*Simpson v. Gamache*, 216.)
2. **ORDER OF CONTRACTOR—EFFECT OF PAYMENT BY SCHOOL TRUSTEES.**—The contractor, having expressly ordered the trustees of the school district to pay the claims of material-men, will be discharged from further liability to the plaintiffs, who are material-men, if such trustees should voluntarily pay the judgment properly rendered against him in favor of the plaintiffs, and cannot complain of such payment. (*Id.*)
3. **NUDUM PACTUM—OPTION TO PURCHASE LAND—PROPOSAL NOT ACCEPTED—WITHDRAWAL.**—An option given to a real estate agent proposing to sell lands, but wishing himself to purchase the same, to buy within a time limited, upon certain terms and conditions, of which no notice of acceptance was given, and for which no consideration was paid, and which he is free to exercise or not, is a mere *nudum pactum*, and amounts only to a continuing proposal, which may be withdrawn by the party making it before such notice of acceptance is communicated; and after notice of such withdrawal the option cannot be exercised. (*Brown v. San Francisco Savings Union*, 448.)

See Conversion, 1; Corporation, 5, 6; Counties, 11, 12; Estates of Deceased Persons, 21-24; Lien; Negligence, 14, 15; Sales, Specific Performance; Statute of Frauds; Vendor and Vendee.

CONVERSION.

1. **ACTION FOR CONVERSION—INTEREST LIMITED TO PERCENTAGE—BREACH OF CONTRACT TO DELIVER PRUNES—DAMAGES NOT WITHIN**

CONVERSION (Continued).

JURISDICTION.—A complaint which sets forth a contract limiting the interest of the plaintiff in a crop of prunes, to be delivered by the defendants to the plaintiff at its packing-house, to two per cent of the prunes, and alleging a breach of the contract, and a conversion by the defendants of the entire crop of prunes, of the alleged value of seven hundred dollars, shows only a cause of action for the recovery of fourteen dollars damages, which is not within the jurisdiction of the superior court, and a demurrer thereto for want of jurisdiction of the subject-matter was properly sustained, and the action dismissed. (*California Cured Fruit Association v. Ainsworth*, 461.)

2. **MEASURE OF DAMAGES FOR CONVERSION.**—Where the plaintiff is the general owner, or is accountable over to a third person for goods converted, the measure of damages is their value at the time of the conversion; but if the plaintiff has only a special interest or limited property in the goods, he can recover from the owner of the remaining interest only to the extent of his interest therein. (*Id.*)
3. **CIRCUIITY OF ACTION—POLICY OF LAW—ACCOUNTABILITY OF PLAINTIFF AS TRUSTEE—BREACH OF CONTRACT FOR POSSESSION.**—To avoid circuity of action, it is the policy of the law that the rights of both parties shall be settled in one action; and where, if the contract were carried out, the plaintiff would be accountable as a trustee of the defendants for their interest in the property, he cannot recover the value of such interest, notwithstanding their breach of an agreement for possession thereof by the plaintiff. (*Id.*)
4. **CONVERSION, HOW CONSTITUTED.**—Conversion of the property does not necessarily imply that the defendant has destroyed or changed or transferred the property; but it takes place when the party charged takes the property, and claims and uses it as his own, and refuses to deliver it to the owner on demand. (*Perkins v. Maier & Zobelein Brewery*, 372.)

CORPORATIONS.

1. **TRANSFER OF STOCK—DECREE OF DISTRIBUTION—APPEAL—REVERSAL—ACTION BY EXECUTOR TO RECOVER DIVIDENDS.**—The transfer of stock in a corporation to a distributee, which derives its efficacy solely from the decree of distribution, is suspended as to its efficacy, and as to the power of further transfer thereof, by an appeal from the decree, and upon reversal thereof the executor is entitled to the stock, and may maintain an action against the corporation to recover dividends thereon, though he does not appear to be owner on the books of the company. (*Ashton v. Zeila Mining Co.*, 408.)
2. **TRANSFER OF STOCK BY INDORSEMENT AND DELIVERY—RULE OF CORPORATION—PROTECTION AS TO DIVIDENDS.**—In this state, title to stock passes, as between the parties, by indorsement and delivery; and any rule of a corporation requiring the stock to be transferred upon the books goes no further than to protect the corporation in

CORPORATIONS (Continued).

paying dividends to a recorded stockholder, in the absence of notice of transfer or other right. (Id.)

3. **TITLE OF EXECUTORS—IMPROPER TRANSFER ON BOOKS.**—The corporation could not take advantage of its own wrong in transferring the stock on the books from the distributee of the stock, pending an appeal from the decree of distribution, nor can the assignees derive any rights thereunder, and the title of the executor, upon reversal of the decree, revived, and if not a strict legal title, was in its legal consequences, equivalent thereto. (Id.)
4. **PARTIES TO ACTION FOR DIVIDENDS—ASSIGNEES OF STOCK—WAIVER OF OBJECTION—REPRESENTATION BY ATTORNEYS.**—It seems that the assignees of the stock should have been made parties to the action by the executors to recover the dividends, but objection on that ground is waived if not taken by demurrer or answer. Where the assignees were represented by the same attorneys who represented them in a former action to recover the stock, and might have intervened in this action, they cannot be prejudiced by the omission to make them parties. (Id.)
5. **EXECUTION OF CONTRACT—AGENCY FOR SALE OF LANDS—AUTHORITY OF PRESIDENT—ACTING MANAGER.**—The president of a corporation engaged in selling lands, who, by general resolution of the board of directors, was authorized to make conveyances, and who was manager in fact of its business, and habitually executed contracts for the corporation, without objection from any member of the board of directors, was authorized to bind the corporation by a contract executed by him in the name of the corporation, as president, constituting the plaintiff the exclusive agent of the corporation for the sale of its lands in certain counties, and requiring of him the performance of other services. (*Pettibone v. Lake View Town Company*, 227.)
6. **ACTION UPON CONTRACT—SALE OF LANDS—STATUTE OF FRAUDS.**—In an action for services rendered under the contract for the agency to sell lands, the statute of frauds is no defense. No authority was given to the agent to execute conveyances, and even if he could not make a valid contract of sale to bind the corporation, it would be no defense to the action for services rendered to the corporation, for which it had the power to contract. (Id.)
7. **UNEXECUTED CLAUSE APPENDED—CONTRACT NOT INCHOATE.**—An unexecuted clause appended to the executed contract, after the signatures thereto, purporting to be an agreement by another corporation to pay for one half of the plaintiff's services, does not make the contract for full payment thereof, made between the parties who executed it, inchoate or incomplete. (Id.)
8. **MORTGAGE BY CORPORATION—UNAUTHORIZED EXECUTION—SPECIAL MEETING OF DIRECTORS—WANT OF NOTICE.**—The execution of a mortgage in the name of a corporation, upon property belonging thereto, cannot be authorized at a special meeting of the directors,

CORPORATIONS (Continued).

at which all of them were not present, and of which no notice was given. (*Relley v. Campbell*, 175.)

9. **FORECLOSURE—ESTOPPEL—REPRESENTATIONS BY MANAGER—OWNERSHIP OF PROPERTY AND STOCK—EVIDENCE.**—Upon foreclosure of such unauthorized mortgage, in order to justify evidence against the corporation of an estoppel based upon representations as to its regularity and validity, made by one who was the acting president, manager, and treasurer of the corporation, and who joined individually in the execution of the mortgage, and was claimed by the mortgagee to be the sole owner of the corporate property and stock, it must be proved that he was the sole owner of the stock. Until such proof was given, the corporation must be treated as a separate entity, as to which such representations were not competent evidence. (*Id.*)
10. **MORTGAGE OF CORPORATION—FORECLOSURE—ABSENCE OF RESOLUTION OF AUTHORITY—ESTOPPEL.**—A corporation defendant, against whom a mortgage is sought to be foreclosed, is estopped to deny its validity, notwithstanding the absence of a proper resolution of authority therefor, where it is made to appear that the plaintiff conveyed land thereto, and took the mortgage in part payment thereof, believing that the corporation had legally executed it, and that the latter retained the possession and benefits of the land and sold part thereof, and recognized its indebtedness therefor, which was acquiesced in, and not disputed by the directors or any stockholders until the mortgage was foreclosed, five years after the purchase. (*Blood v. La Serena Land and Water Company*, 361.)
11. **AGENCY—EMPLOYMENT OF BROKER BY PLAINTIFF—SUBSCRIPTIONS TO STOCK—GOOD FAITH—TRUST—ESTOPPEL NOT AFFECTED.**—The employment, by the plaintiff, of a real estate broker to negotiate a sale of the land, before its conveyance to the corporation, which employment was known to the directors and promoters of the corporation, but was unknown to some of the stockholders thereof, and a subscription by such broker to the stock of the corporation, and his becoming secretary thereof, do not show him to be a trustee of the corporation, nor affect the estoppel of the corporation to deny its mortgage to the plaintiff, where it appears that all of the subscriptions to stock were in good faith, that the plaintiff was not a director, promoter, or trustee of the corporation, and that none of the stockholders were deceived or misled by any misrepresentations or concealment by plaintiff or his agent, nor by any of the subscriptions to the stock. (*Id.*)
12. **AGENCY FOR CORPORATION—EVIDENCE—DECLARATIONS OF PRESIDENT—AUTHORITY NOT PROVED.**—The declarations of an agent are not admissible to prove the agency; and in an action against a corporation for grading done upon a railroad, where one who became president of the corporation testified that she did the work of grading at her own expense, and on her own account, to the knowledge of the plaintiff, evidence of her declaration, to the effect that she, in the

CORPORATIONS (Continued).

name of the corporation, had the work done, is not admissible against the corporation, without proof of her authority to act for the corporation in that behalf. (*Petterson v. Stockton and Toulumne R. R. Co.*, 244.)

13. **BELIEF OF PLAINTIFF AS TO EMPLOYMENT.**—The belief of the plaintiff that he was employed by a corporation defendant is immaterial, in the absence of proof of some action on the part of the corporation justifying such belief. (*Id.*)

See Criminal Law, 15, 16; Municipal Corporations; Place of Trial; Street-assessment, 2, 23, 24.

COSTS.

1. **FAILURE OF PLAINTIFF TO RECOVER—DEFEAT OF COUNTERCLAIM—DISCRETION.**—A plaintiff who fails to recover against a defendant is not entitled to any costs against him, notwithstanding his costs were largely incurred in defending against a counterclaim of such defendant, upon which the defendant also failed to recover. In such case the court is allowed no discretion as to the costs. (*Benson v. Braun*, 41.)
2. **COSTS, WHEN NOT RECOVERABLE—STRIKING OUT COST-BILL.**—In an action for damages, where the plaintiff recovers less than three hundred dollars, he is not entitled to recover his costs, and it is proper in such case for the court to strike out plaintiff's memorandum of costs. (*Kishlar v. Southern Pacific Co.*, 636.)
3. **PRACTICE—FILING NOTICE OF MOTION TO TAX COSTS—COMPLIANCE WITH STATUTE.**—The practice, in this state, of filing within five days after notice of the bill of costs, a notice of motion to tax the costs, and on the day designated in the notice, or the day to which the hearing is postponed, calling up the motion *viva voce*, instead of filing a formal written motion in the first instance, is a sufficient compliance with the statute requiring the motion to be made within the five days. (*Id.*)

See Appeal, 17; Eminent Domain, 4.

COUNTIES.

1. **COUNTY GOVERNMENT ACT—INVALID LIMITATION OF SUPPLIES AND PRINTING—CONSTITUTIONAL LAW.**—That portion of section 25 of subdivision 21 of the County Government Act which provides that "no supplies, printing, stationery, or books shall be procured of any person or firm whose paper has not been established or whose place of business has not been established in the county for one year or more prior to the time of fixing said prices," is unconstitutional and void. It violates section 11 of article I of the constitution, requiring that "all laws of a general nature shall have a uniform operation," and section 21 of the same article, which forbids that "any citizen or class of citizens be granted privileges or immunities

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COUNTIES (Continued).

which, upon the same terms, shall not be granted to all citizens." (Van Harlingen v. Doyle, 53.)

2. "UNIFORM OPERATION" OF LAW—CLASSIFICATION—DURATION OF BUSINESS NOT A PROPER BASIS.—In order that a general law may have a uniform operation, it must be based upon a classification which is not arbitrary, but founded upon some natural or intrinsic or constitutional distinction. All merchants and publishers of newspapers stand in the same relation to supplies and advertising for the county; and they cannot be arbitrarily classified by the period of time during which they have engaged in business in the county. (Id.)
3. PRINTING FOR COUNTY OFFICERS—SEPARATION OF VALID FROM INVALID PROVISIONS—REPEAL OF CODE SECTION.—The provisions of section 25 of subdivision 21 of the County Government Act relating to supplies furnished and printing and advertising done for county officers by a person or newspaper, to be designated by them, at prices fixed for the county printing, are valid, and separable from the invalid provisions of that section, and being inconsistent with section 3766 of the Political Code, and later in date, have worked a repeal of that section. (Id.)
4. PRINTING DELINQUENT TAX LIST—PAYMENT BY SUPERVISORS—INJUNCTION AGAINST AUDITOR.—When the delinquent tax list was published by the tax-collector in the only newspaper that was willing to publish it at the prices fixed by the supervisors for county advertising, and the county had allowed the claim therefor upon the certificate of the tax-collector, an injunction will not lie to restrain the county auditor from drawing the warrant for the allowed claim on the ground that such newspaper had not been published in the county for one year prior to the advertising. (Id.)
5. COUNTY GOVERNMENT ACT—INVALID SECTION FOR ORDINANCES OF ELECTORS.—Section 13 of the County Government Act of 1897 (Stats. 1897, p. 454), permitting the electors of the county to frame and pass ordinances for the government of the county, "having the same force and equal effect as though adopted and ordained by the board of supervisors," is inconsistent with the legislative power granted under our system of government to the board of supervisors, and is invalid and void. [Beatty, C. J., dissenting.] (Ex parte Anderson, 69.)
6. CONSTITUTIONAL LAW—SYSTEMS OF COUNTY GOVERNMENT—COORDINATE LAW-MAKING POWERS.—Without deciding whether the legislature may confer local law-making powers directly upon the people, it cannot establish two equal co-ordinate law-making powers, under the system of county government provided for in the constitution. Under the constitution and the County Government Act, the legislative power conferred upon the board of supervisors must be preferred to an inconsistent law-making power conferred upon the electors of the county. (Id.)

COUNTIES (Continued).

7. **DIVISION OF COUNTY—BOARD OF COMMISSIONERS—CHANGE OF SETTLEMENT—MANDAMUS—CONTROL OF DISCRETION.**—*Mandamus* never lies to compel a tribunal to perform in a particular way an act which involves the exercise of discretion and judgment, and will not lie to compel a board of commissioners, appointed to adjust accounts upon the division of a county, which has performed its functions, to re-settle and readjust its accounts between the old and the new county in a particular way. (County of Riverside v. County of San Bernardino, 517.)
8. **BOARD FUNCTUS OFFICIO—EXHAUSTION OF POWER.**—The board of commissioners, having performed the functions for which it was created, is *functus officio*; and its power, being limited to one express object, was exhausted by its exercise. (Id.)
9. **POLITICAL ACTION OF LEGISLATURE AND BOARD—JURISDICTION OF COURTS.**—The whole matter of the division of a county, and the creation of a new county, and the determination of what, if any, liability there shall be between a new county and the old one from which it is carved, is in its nature political, and not judicial, and belongs wholly to the legislative department of the government. No court exercising either law or equity powers has jurisdiction to control any political action of the legislature or of a board of commissioners established by it as its political agent or instrumentality. A court can only enforce a liability or legal rights expressly established by the legislature. (Id.)
10. **JURISDICTION OF EQUITY—FRAUD OR MISTAKE—JURISDICTION OF SUBJECT-MATTER.**—A court of equity has jurisdiction in cases of fraud or mistake, provided it has jurisdiction of the subject-matter in connection with which the fraud or mistake occurred; but it has no jurisdiction of the subject-matter of fraud or mistake connected with legislative or political action, which is beyond judicial control. (Id.)
11. **PUBLIC BRIDGE BETWEEN COUNTIES—POWER OF SUPERVISORS—CONTRACT WITH RAILROAD COMPANY—MONEY PAYMENT—BINDING CONTRACT.**—The boards of supervisors of adjoining counties have authority to contract with a railroad company for the payment of different sums of money from each to the railroad company to aid it in the construction of a new bridge across a river, constituting a boundary between the two counties, so as to make a separate roadway for teams and footmen, and another underneath, for the use of the railroad company, which new bridge is designed to replace an old dilapidated bridge, which had been long used both by the railroad company and the public, and which was less convenient and more dangerous to the public. The contract by the supervisors to pay the money so agreed to be paid to the railroad company, which constructs the bridge as agreed, is binding upon the county. (Croley v. California Pacific R. R. Co., 557.)
12. **STATUTORY CONSTRUCTION—LIMITATIONS UPON POWER OF SUPERVISORS—COUNTY GOVERNMENT ACT INAPPLICABLE—POWER UNDER**

COUNTIES (Continued).

POLITICAL CODE.—Section 25 of the County Government Act, defining the power of supervisors to build bridges within the county, and placing certain limitations upon their authority, therein set forth, only applies to bridges built "within the county," and has no application to a bridge constructed across a river which is the boundary between two counties. The latter case is governed by section 2713 of the Political Code, which is plenary in its terms, and does not limit the power of the supervisors either in the extent or mode in which it is to be exercised, and does not require that the entire cost of construction thereof shall be borne by the counties, or that the ownership thereof shall be vested in them; and the extent and mode of exercising the power is to be determined by the respective boards in each case. (Id.)

See Ferries.

COVENANTS. See Deed, 1.

CRIMINAL LAW.

1. **TRIAL.—EVIDENCE.—TESTIMONY UPON PRELIMINARY EXAMINATION.—CONFLICTING TESTIMONY AT FORMER TRIAL.—IMPEACHMENT.**—Upon the trial of a defendant accused of felony, where the prosecution introduced the testimony of a witness taken upon the preliminary examination, and the defendant, for the purpose of contradicting the witness, introduced his evidence taken upon a previous trial, the witness did not thereby become the witness for the defendant, within the rule that a party cannot impeach his own witness, and it was error for the court to refuse to allow the defendant further to impeach the witness by evidence of his bad character. (People v. McFarlane, 618.)
2. **IMPEACHMENT BY PARTY CALLING WITNESS.—CONSTRUCTION OF CODE.—EXCEPTIONS TO RULE.**—Section 2049 of the Code of Civil Procedure, forbidding a party, in general terms, to impeach his own witness by evidence of bad character, is but the enactment of the previously existing general rule, which allowed of exceptions thereto. The rule does not apply where the calling of the witness is not voluntary, or where it becomes necessary to call the adverse party, or where the witness was first called by the adverse party, and is called by the other party for purposes connected with his original testimony, and especially where he is entitled to prove his different sworn statements, without opportunity of cross-examination with reference thereto. (Id.)
3. **EVIDENCE.—DECLARATIONS OF THIRD PERSONS.**—Upon the trial of defendants accused of felony, the declarations of third persons, not made in the presence or hearing of the defendants, are hearsay and incompetent; and where such declarations were admitted upon insistence of the district attorney, and were of such a character that they might have tended to prejudice the jury, to the injury of the defendants, their admission will be deemed prejudicial error. (People v. Warren, 202.)

CRIMINAL LAW (Continued).

4. **IMPEACHMENT OF WITNESS—INDICTMENT AND TRIAL FOR SAME OFFENSE.**—A witness for the defendant cannot be impeached, upon cross-examination, by showing that he had been indicted and tried for the same offense, without seeking to show that he had been convicted of a felony. (Id.)
5. **EVIDENCE—CROSS-EXAMINATION OF DEFENDANT—RESIDENCE—COLLATERAL QUESTIONS—IMPEACHMENT—PREJUDICIAL ERROR.**—Where a defendant, accused of crime, testified only as to his present residence out of the county of the venue, he cannot be properly cross-examined as to his residence in the county at a time long prior to the date of the offense charged; and his answers to collateral and irrelevant questions about such prior residence are conclusive, and cannot be contradicted for the purpose of impeachment. The admission of the testimony of the sheriff in contradiction of the defendant, that he was at such prior date in the county, at the county jail, was prejudicially erroneous, and the error was not cured by striking out the allusion to the county jail. (*People v. Rodriguez*, 140.)
6. **BURNING HOUSE TO DEFRAUD INSURERS—EVIDENCE—HOLES BORED IN FLOOR—ADMISSIBILITY OF BRACE.**—Upon the trial of a defendant charged with burning his dwelling-house with intent to defraud the insurers of the property, where it was proved that after the fire was extinguished upon the lower floor, holes were found bored in the upper floor, with coal-oil poured around them and into them, a brace found in a cupboard in one of the upper rooms, on the day after the fire, by a witness, who was put in charge of the house by the foreman of the fire department, shortly after the fire, is admissible as a circumstance tending to show that defendant had the means at hand with which to bore the holes found in the floor. (*People v. Bishop*, 682.)
7. **TESTIMONY OF CHIEF OF FIRE DEPARTMENT—PUTTING PERSON IN CHARGE OF DWELLING—UNIMPORTANT EVIDENCE.**—Testimony of the chief of the fire department, that he put one of his men in charge of the building after the arrest of the defendant, and charged him not to allow any one to enter unless the chief was present, if not admissible, is too unimportant to warrant a reversal. The only matter of importance is what the person put in charge actually did. (Id.)
8. **ODOR OF COAL-OIL UPON CLOTHES—RULING WITHOUT INJURY.**—Where it was proved that, at the time of the fire, coal-oil was found scattered around the floors and articles of furniture in different parts of the house, under circumstances pointing to guilty knowledge on the part of the defendant, evidence was admissible to show that there was odor of coal-oil on the clothes of the defendant when he was arrested; and a further statement of the witness, that there was still a slight odor of coal-oil on some of the garments brought into court and identified, which the court excluded from evidence,

CRIMINAL LAW (Continued).

is without injury, where the defendant did not move to strike out such statement. (Id.)

9. EXAMINATION OF WITNESSES BY COURT—REMARKS AND SUGGESTIONS—ABSENCE OF OBJECTION OR EXCEPTION—APPEAL—PRESUMPTION.—Where the court cross-examined the defendant and other witnesses of its own motion, and made remarks and suggestions, to none of which acts of the court objection was made, or any exception taken by the defendant, it is too late upon appeal to raise a question as to such matters; and where an objection was taken to the interruption of a witness by the court, and no exception was reserved, it must be presumed upon appeal that the defendant was finally satisfied that the court was right. (Id.)
10. CROSS-EXAMINATION OF DEFENDANT—FORMER TESTIMONY—STEALING OF MONEY FROM VEST—HESITATION AND DIFFERENCE SHOWN BY RECORD.—Where the defendant upon examination in chief testified as to the stealing of money from his vest on the night of the fire, to raise an inference that the thief fired the house, it was competent to cross-examine him fully as to all the facts and circumstances attending the matter, and to show by comparison of his former testimony that his hesitation as to the facts appeared therein by question and answer, and that he testified with hesitation, and differently, at the first trial as to facts narrated by him at the last trial without hesitation. If his former hesitation had not appeared from the record, and his examination in chief did not show his demeanor at the first trial, his demeanor thereat could not be proved by him upon his cross-examination. (Id.)
11. CRUELTY TO ANIMAL—COMPLAINT IN POLICE COURT—MALICE—LANGUAGE OF STATUTE—EQUIVALENT IMPORT.—A complaint in a police court charging the defendant with cruelty to an animal, committed "by willfully and unlawfully cruelly beating and torturing a certain dog," named, need not specifically charge that the act was malicious. Though malice is a necessary ingredient in the offense, it is necessarily involved in the charge of willful and unlawful cruelty, which is malice. It is sufficient to use language of equivalent import, without using the very language of the statute. (Ex parte Mauch, 500.)
12. POLICE COURT OF MARYSVILLE—POWER OF LEGISLATURE—JURISDICTION OF OFFENCE CHARGED.—The legislature had power by the act of 1876 to provide in the reincorporation of the city of Marysville for a police court for said city; and its intent so to do is sufficiently manifested by the provisions of that act for the election of a police judge, and giving to him all the power granted to him by the Political Code, except the power to appoint clerks, and making the assessor *ex officio* clerk of the police court. A police judge implies a police court, and the jurisdiction of that court is defined by the provisions of the Political Code, which include the offense of which the defendant was convicted. (Id.)

CRIMINAL LAW (Continued).

13. **SUFFICIENCY OF INFORMATION—SUBSTANTIAL CONFORMITY TO STATUTE—USE OF EQUIVALENT WORDS.**—An information for a felony is sufficient if it substantially conforms to the statute, and uses words equivalent in meaning thereto, though not the precise words employed in the statute. (*People v. Ward*, 301.)
14. **INFORMATION FOR EMBEZZLEMENT—CHANGE OF FORM OF EXPRESSION IN STATUTE.**—An information for embezzlement which shows that the defendant received funds by virtue of his trust as the financial secretary of a corporation, and embezzled and converted the same to his own use, "contrary to his said trust," is not defective because not using the statutory words, "not in the due and lawful execution of his trust." The two expressions are equivalent, and convey the same meaning. (*Id.*)
15. **PROOF OF INCORPORATION—DE FACTO EXISTENCE.**—It is sufficient to prove the *de facto* existence of the corporation, the funds of which were embezzled by the defendant; and proof that it was a corporation *de jure* is not essential. (*Id.*)
16. **DEMAND FOR MONEY EMBEZZLED—AUTHORITY OF TREASURER.**—A demand, by the corporation, for the money embezzled is not an indispensable requirement of the law, to constitute the offense, which may possibly be proved without a demand, though a demand and refusal, if other essential facts exist, is evidence of embezzlement. A demand by the treasurer of the corporation, who was also a member of a special committee to investigate the alleged embezzlement, was made by sufficient authority. (*Id.*)
17. **DISPROVED DENIAL OF RECEIPT OF EMBEZZLED MONEY—EVIDENCE OF OFFENSE.**—Where the defendant not only refused to comply with the demand for return of the money, but denied that he ever received any part of the money, alleged to be embezzled, and such denial was disproved, and it was found by the jury that he did receive it, the fact of such receipt renders the denial thereof convincing evidence of the offense charged. (*Id.*)
18. **EVIDENCE OF OTHER MONEYS DRAWN BY DEFENDANT.**—Evidence is admissible that other moneys of the corporation were drawn by the defendant, upon similar orders, from the same and other banks, and were delivered to the defendant, and that they were not drawn for the protection of the corporation, or because of its wishes. (*Id.*)
19. **PROOF OF CORPUS DELICTI—ORDER OF EVIDENCE.**—Proof of the *corpus delicti* does not necessarily involve or require proof that the crime was committed by the defendant. The proper order of evidence is, that there should be first, independent proof of the body of the offense, but a case should not be reversed, merely because of a departure from such order. In this case it is held that the *corpus delicti* was sufficiently proved, before proof of the obtaining of other moneys by the defendant. (*Id.*)
20. **IMPEACHMENT OF WITNESS—CONVICTION OF FELONY—ABSENCE OF SENTENCE.**—A witness may be impeached by showing that he has

CRIMINAL LAW (Continued).

been convicted of a felony by the verdict of a jury, and the fact that no sentence had yet been pronounced upon the witness is immaterial, where the verdict does not appear to have been set aside. (Id.)

21. **EVIDENCE OF REPUTATION—PERSONAL KNOWLEDGE—STRIKING OUT TESTIMONY.**—The testimony of witnesses called to prove the reputation of a witness, who testified from personal knowledge only, was properly stricken out. (Id.)
22. **REFUSAL OF INAPPLICABLE INSTRUCTIONS.**—Requested instructions which are inapplicable to the evidence are properly refused. (Id.)
23. **AUTHORITY TO DRAW MONEY TO DELAY CREDITORS—DEFENSE TO EMBEZZLEMENT.**—The fact that the corporation gave authority for the withdrawal of money from the bank, for the purpose of hindering and delaying its creditors, cannot constitute a defense to an indictment for the embezzlement of its funds. (Id.)
24. **REQUESTED INSTRUCTION AS TO TESTIMONY OF ACCOMPLICE.**—Where the case was not tried on the theory that the treasurer of the corporation was an accomplice with the defendant in the embezzlement charged in the information, it requires something more than suspicious circumstances connected with other transactions to justify a requested instruction predicated upon his being an accomplice with the defendant; and where such requested instruction was also inaccurate and misleading, it was properly refused. (Id.)
25. **ARGUMENT OF COUNSEL—VITUPERATIVE EPITHETS—CHARGE TO JURY—PRESUMPTION.**—Counsel for the prosecution ought not to indulge in extravagant vituperative epithets against the defendant, but where the court charges the jury in relation thereto, that they must not consider the personal views and opinions expressed by counsel, it is not to be presumed that the jury disregarded the charge, nor that the defendant was prejudiced. (Id.)
26. **GRAND LARCENY—TAKING STOLEN GOODS INTO ANOTHER COUNTY—VENUE—JURISDICTION OF OFFENSE—INFORMATION.**—Under section 786 of the Penal Code, providing that "when property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county," an information for grand larceny, charging that the property described was stolen by the defendant in another county, and that the property so stolen was brought by the defendant into the county of the venue, shows jurisdiction of the original offense in the latter county. Such information need not allege that any larceny was committed in the county of the venue, nor that the taking of the goods into that county was felonious. (*People v. Prather*, 386.)
27. **MURDER—CHALLENGE TO JURY PANEL—BIAS OF ELISOR—TEST—EVIDENCE—ERRONEOUS RULINGS.**—Upon a challenge to the panel of trial jurors by a defendant charged with murder, for the bias of

CRIMINAL LAW (Continued).

an elisor appointed by the court to summon talesmen to complete the panel, the test of such bias is the same as that of a talesman. Upon the trial of the challenge, it is error to limit the defendant to mere general questions as to whether the elisor had formed or expressed an opinion or had a bias, and to refuse him the right to ask whether he remembered that the dying statement of the deceased accused the defendant, and whether he believed that the deceased had been murdered, and that the defendant was in the saloon of the deceased shortly before the killing, and as to what witnesses he had heard upon the trial of another defendant accused of the same murder, and whether from what he had heard he would make a fair juror, etc. (*People v. Teshara*, 542.)

28. **ACCUSATION BY DECEASED IN PRESENCE OF DEFENDANT—DENIAL BY DEFENDANT—HEARSAY.**—The statement of the deceased, not made as a dying declaration, but made in the presence of the defendant and another person brought before him, in which he accused them of the shooting, which the defendant denied, is inadmissible hearsay, as against the defendant. (*Id.*)
29. **ACCUSATION, WHEN AND WHEN NOT ADMISSIBLE—EXPLANATION OF CONDUCT—ADMISSION.**—In such a case, it is not the accusation merely, but the conduct of the deceased thereunder, as indicating an admission, that is evidence, and the only reason for admitting the accusation is to explain the conduct. The accusation is not admissible, where it appears that there was no admission of its truth, either expressly or tacitly, but an express denial thereof. (*Id.*)
30. **REASONABLE DOUBT—IMPROPER MODIFICATION OF REQUESTED INSTRUCTION.**—An instruction which is a clearer and more logical statement of the law of reasonable doubt as proposed, than after the modification thereof by the court, if allowed, and not refused as being embodied in the charge, should be given as requested. (*Id.*)
31. **MURDER—EVIDENCE—SHIRTS AND CUFFS OF DECEASED—LAUNDRY-MARK—IDENTIFICATION.**—Upon the trial of a defendant accused of murder, shirts and cuffs, found in a valise of the deceased in the possession of the defendant, were sufficiently identified to be received in evidence, where it appeared that other articles of the deceased were found in the valise, that one of the cuffs bore his initials, and that the laundry-mark upon the shirts corresponded with the laundry-mark upon a package containing the cuffs and shirts, which was entered in the books of the laundry. (*People v. Westlake*, 505.)
32. **QUESTIONS FOR JURY—INSTRUCTIONS—PRESUMPTION.**—The questions whether the evidence was sufficient to prove the fact that the deceased owned the shirts, or whether the circumstance was an indication of guilt, were for the jury to determine, under proper instructions of the court. The instructions will be presumed proper, where no objections were made to them. (*Id.*)
33. **DISCRETION OF COURT—OBJECTS COGNIZABLE BY THE SENSES—DISCRETION NOT ABUSED—CONNECTION OF ACCUSED WITH OBJECTS.**—

CRIMINAL LAW (Continued).

Under section 1954 of the Code of Civil Procedure, the admission of objects cognizable by the senses, and of the proof thereof, in a proper case, must be regulated by the sound discretion of the court. Its discretion was not abused by the admission, after proper preliminary proof, of the shirts and cuffs of the deceased which were found in his valise, with other articles belonging to him, in the possession of the defendant, being thus directly traceable to the accused. (Id.)

34. **REFRESHMENT OF MEMORY OF WITNESS—LAUNDRY-MARK—ENTRIES IN LAUNDRY BOOK—COUNTING OF PIECES BY ANOTHER.**—A witness who personally made the entries in the laundry book at the time when the laundry of the deceased was received at the laundry, may refresh his memory thereby; and the fact that some one else counted the pieces in the presence of the witness is immaterial, where the only question is as to the identity of the laundry-mark entered upon the book with that upon the shirts found in the valise of the deceased, and the laundry-mark was not received by hearsay. (Id.)
35. **JURY—SPECIAL VENIRE SUMMONED BY DEPUTY CORONER—CHALLENGE TO PANEL—DEPARTURE FROM STATUTE.**—A challenge to the panel of trial jurors, completed upon a special venire summoned by a deputy coroner from a list of names from a particular township furnished to him by the coroner, should be allowed, under section 1059 of the Penal Code, on the ground of material departure from the forms prescribed by statute for the drawing and return of the jury. (*People v. Enright*, 527.)
36. **MURDER—ERRONEOUS INSTRUCTION AS TO MOTIVE—CASE AFFIRMED.**—Upon a prosecution for murder, where the defendant relied wholly upon self-defense, and that the shot was fired to prevent injury to himself, and the testimony was conflicting as to who was the aggressor, and as to whether the shooting was justified, an instruction as to motive, which was an argument for the prosecution, and assumed a contention of defendant's counsel that without proof of motive no crime was shown, and which states that motives were difficult to prove, and suggested that the prosecution could be aided by the possibility of a concealed motive of which there was no proof, is erroneous, and violative of section 19 of article VI of the constitution. (*People v. Vereneseneckockockhoff*, 120 Cal. 497, affirmed.) (Id.)
37. **MOTIVE, HOW PROVED.**—The motive for a murder may be inferred from evidence which would warrant it, without express proof; but the prosecution cannot be excused from making convincing proof upon the point by proof of the killing and of any circumstances tending to show a wicked or criminal motive or intent. (Id.)
38. **HOMICIDE—ACQUITTAL OF MURDER—TRIAL FOR MANSLAUGHTER—PEREMPTORY CHALLENGES TO JURY.**—A defendant charged with murder, and convicted of manslaughter, is acquitted of murder,

CRIMINAL LAW (Continued).

- and where the conviction of manslaughter is reversed upon appeal, a second trial can only be had upon the charge of manslaughter, and the defendant is entitled upon such trial to no more than ten peremptory challenges to the jury. (*People v. Smith*, 453.)
39. **IMPEACHMENT OF PROSECUTING WITNESS—CONTRADICTIONARY PRIOR TESTIMONY—EXPLANATION—CHARACTER OF DEFENDANT.**—A prosecuting witness may be impeached by the defense by proving that his evidence was contradictory to that given at the inquest and the preliminary examination; but the prosecution has an equal right to prove his explanation thereof, to the effect that, knowing the character of the defendant and his brother, he was afraid to testify against them. The defendant cannot complain that the explanation incidentally involved an attack upon his character. (*Id.*)
40. **EXPRESSION OF JUDGE—COMPETENCY OF TESTIMONY.**—An expression of the judge in allowing the witness to explain his former evidence, "I think the testimony is all right," imports only that the testimony was competent and admissible, and could not be understood by the jury as intimating that, in the opinion of the judge, the witness was telling the truth. (*Id.*)
41. **ARGUMENT OF COUNSEL—IMPROPER REMARKS—REBUKE AND INSTRUCTION BY JUDGE.**—Where, upon the argument of special counsel for the prosecution, highly improper remarks were made, involving a wish that the defendant had thrown down the bars, so that the prosecution might have proved his character, and the court rebuked the counsel, and instructed the jury not to consider the question of the defendant's character, the misconduct was not so serious as to call for a reversal of the judgment. (*Id.*)
42. **EVIDENCE—THEORY OF SUICIDE—POWDER-MARKS ON HAT—CROSS-EXAMINATION—EXHIBITION OF HAT NOT IDENTIFIED.**—Where the defense, in order to corroborate a theory of suicide by the deceased, called a witness to show that there were powder-marks on the hat worn by the deceased at the time of the shooting, it was proper for the prosecution, on cross-examination, for the purpose of showing that the witness was no judge of powder-marks, to exhibit to the jury the marks on any hat thought by the witness to bear powder-marks, though not identified nor offered in evidence. (*Id.*)
43. **TECHNICAL ERROR IN INSTRUCTION—SELF-DEFENSE INAPPLICABLE.**—A technical error in instructing the jury that displaying of a deadly weapon in a rude, angry, and threatening manner, in the presence of two or more persons, is a criminal offense, omitting the essential qualification that it was not done in necessary self-defense, is not ground of reversal, where self-defense was wholly foreign to the case, on all the evidence. (*Id.*)
44. **MURDER—INSTRUCTIONS—ABSENCE OF INTENTION TO KILL—REQUEST COVERED BY CHARGE.**—Upon a trial for murder, it is not error to refuse an instruction applicable to the defendant's testimony, that if the jury should find from the evidence that at the time when the defendant assaulted the deceased he did not intend to kill him, they could not find the defendant guilty of murder

CRIMINAL LAW (Continued).

in the first degree, where it appears that such requested "instruction was fully covered by the other instructions given in the charge of the court." (People v. Ross, 256.)

45. **CAUSE OF DEATH—REQUESTED INSTRUCTION INAPPLICABLE TO EVIDENCE.**—Where there was no evidence which would authorize the jury to find that deceased came to his death by reason of any neglect or unskillful treatment on the part of the surgeons, a requested instruction upon that subject was properly refused. (Id.)
46. **DISCRETION OF JURY AS TO PENALTY—CONTROL BY INSTRUCTION IMPROPER—REASONABLE DOUBT.**—The discretion given to the jury by section 190 of the Penal Code, in determining the penalty for murder in the first degree, is to be exercised upon their own consideration of the evidence, without other instruction than to call the attention of the jury to its provision. Their discretion cannot be controlled by instructions presenting reasons for its exercise in one mode rather than another; and a requested instruction, that in case of their finding murder in the first degree, they should, in their discretion, as to fixing the penalty therefor, give the defendant the benefit of a reasonable doubt, in favor of imprisonment for life, rather than the death penalty, was properly refused. (Id.)
47. **INDICTMENT—CIRCUMSTANCES OF OFFENSE.**—An indictment sufficiently charging the defendant with the crime of murder is not impaired by the manner in which the facts constituting the crime, or the circumstances under which it was committed, are subsequently stated therein. (Id.)
48. **MOTION TO SET ASIDE VERDICT—MISCONDUCT OF JURY—NEWLY DISCOVERED EVIDENCE—CONTINUANCE FOR AFFIDAVITS NOT SUPPORTED.**—Where the defendant, upon an adjourned day for pronouncing judgment, moved to set the verdict aside for misconduct of the jury, and for newly discovered evidence, and asked for a continuance for a reasonable time in which to procure affidavits of witnesses upon both grounds, but presented no affidavit whatever in support of the motion, the continuance was properly refused. (Id.)
49. **MURDER—CHALLENGE TO PANEL—OPEN VENIRES—BIAS OF SHERIFF—CONTINUANCE OF JURORS SWORN—EXTRA CHALLENGES—WAIVER OF RIGHT TO OBJECT.**—Upon a prosecution for murder, where two separate challenges to the panel of talesmen summoned upon open *venires* to complete the jury, for bias of the sheriff, were overruled, and three jurors were impaneled and sworn, and five peremptory challenges exercised thereunder, and a third challenge under the third *venire* was sustained upon further evidence of bias, after which the privilege was conferred upon the defendant to use five additional peremptory challenges, of which he availed himself, without removing any of the three jurors impaneled, such voluntary continuance of those jurors proves conclusively that he preferred them, and deprives him of the right to object to the rul-

CRIMINAL LAW (Continued).

- ings of the court upon the previous challenges. (*People v. Amaya*, 531.)
50. **CHALLENGES BY PEOPLE—IMPLIED BIAS OF JURORS—OPPOSITION TO CIRCUMSTANTIAL EVIDENCE—DISQUALIFICATION.**—Upon challenges by the people for implied bias of jurors, who stated that they would not base a verdict of guilty upon circumstantial evidence, it cannot be assumed that the case for the people would derive no support from circumstantial evidence. Jurors whose conscience would not permit them to act upon legal evidence in a capital case are disqualified. (*Id.*)
51. **ALLOWANCE OF CHALLENGE NOT SUBJECT TO EXCEPTION.**—The ruling of the court allowing a challenge for implied bias of a juror is not the subject of exception. (*Id.*)
52. **EVIDENCE—DYING DECLARATION OF DECEASED—PRELIMINARY PROOF.**—The dying declaration of the deceased is admissible evidence, where there is clear preliminary proof that the declaration was made under the solemn belief of impending death, after all hope of recovery had been resigned, and that every precaution was taken to get the written statement correct. (*Id.*)
53. **ACCUSATION BY DECEASED AGAINST DEFENDANT AFTER ARREST—FAILURE TO REPLY—TACIT ADMISSION—QUESTION OF FACT.**—Evidence that the defendant, after he was arrested, was brought before the deceased prior to his death, and that the latter pointed to him and said, "There is the man that hit me with a club and shot me," and that the defendant, though fully understanding what was said, and free to reply thereto, made no reply, is admissible, as tending to show a tacit admission of the accusation, the weight of which was a question of fact for the jury. (*Id.*)
54. **ACCUSATION OF CRIME CALLING FOR REPLY—OPPORTUNITY AND FREEDOM TO REPLY—ARRESTED PERSON.**—An accusation of crime, not replied to, to be admissible, must be made under such circumstances as to afford the accused person an opportunity to act or speak with freedom, and the statement must be one naturally calling for some action or a reply. In this state, an accusation of crime calls for a reply, even from a person under arrest, where the circumstances surrounding him indicate that he was entirely free to reply, if he had chosen to do so. (*Id.*)
55. **STATEMENT IN PRESENCE OF ARRESTING OFFICER.**—An arrested defendant is not called upon to make any reply to any question or statement directly from the arresting officer; but the fact that he was under arrest, and that an incriminating statement was made by the deceased in presence of the arresting officer, does not make the failure to reply thereto inadmissible evidence though the importance thereof is to be determined by the jury, in view of all the surrounding conditions. [Per *McFarland, J.*, concurring specially.] (*Id.*)
56. **CROSS-EXAMINATION—IMPEACHMENT OF DYING DECLARATION.**—On cross-examination of a witness, who merely testified to what oc-

CRIMINAL LAW (Continued).

curring at the bedside of the deceased, it is not proper to show previous contradictory statements of the deceased, made when he first discovered his wounded condition. Such impeachment can only be made by offering the evidence as part of the defendant's case to contradict the dying declaration. (Id.)

57. **PRESENCE OF ANOTHER DEFENDANT ON NIGHT OF SHOOTING—CONSPIRACY—CRIES OF MURDER—RES GESTAE.**—Evidence that the deceased and another defendant, separately accused of the crime, were playing cards on the night of the shooting, about eleven o'clock, and that about one hour thereafter, cries of murder were heard from the deceased, is admissible, both on the ground of conspiracy, where the dying declaration is evidence of such conspiracy, and as part of the *res gestae*, to establish the time of the assault upon the deceased. (Id.)
58. **MISCONDUCT OF PROSECUTING ATTORNEY—UNPROVED MOTIVE OF CRIME—REFERENCE TO CLUB TESTIFIED TO, BUT NOT PRODUCED—RECRIMINATIONS BETWEEN COUNSEL.**—An unfounded argument of the district attorney, as to the defendant's motive for the crime being a robbery, is not misconduct. He was justified in alluding to a blood-stained club, proved to have been found in the saloon immediately after the assault, where the testimony shows that the defendant struck and wounded the deceased with a club, though the club was not placed in evidence, or formally offered as an exhibit. Ill-timed recriminations between the district attorney and the counsel for the prisoner are not ground of reversal, where no prejudice to the defendant appears to have resulted therefrom. (Id.)
59. **INSTRUCTION—PRESUMPTION OF TRUTHFULNESS OF WITNESS—REBUTTING PROOF—INTEREST AND BIAS.**—It is not error to instruct the jury that the presumption that a witness speaks the truth may be repelled by "his interest in the case, or his bias or prejudice against one of the parties," as well as "by the manner in which he testifies," by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence. (Id.)
60. **INSTRUCTIONS AS TO DYING DECLARATION.**—An instruction stating, in effect, that the jury were not bound by the fact of the admission by the court of the dying declaration of the deceased to conclude that it was made in view of impending death, but that it was for them to determine whether it was so made, and whether it had been correctly reported, is correct, and favorable to the defendant. A requested instruction for the defendant, as to the weight and conclusiveness of dying declarations, and that a dying declaration, alone, will not support a verdict of guilty, was properly refused. (Id.)
61. **SUPPORT OF VERDICT—DYING DECLARATION—SILENCE OF DEFENDANT WHEN ACCUSED.**—The dying declaration of the deceased, and the silence of the defendant when accused by the deceased, are sufficient to support a verdict of guilty of murder in the first degree,

CRIMINAL LAW (Continued).

though there is no other tangible evidence against the defendant. (Id.)

62. **IMPANELMENT OF GRAND JURY—DIFFERENCE IN FORM—SPECIAL VENIRE.**—The impanelment of a grand jury from an entire *venire*, consisting of thirty names placed in the box, four of whom were not served by the sheriff, the panel, so far as formed therefrom, being composed of jurors present and not excused, is purely a difference in form only, from the requirement of the statute that the names of those jurors who were present in court and not excused should be placed in the box; and where there was a failure to secure nineteen grand jurors from the regular *venire*, it was regular for the court to complete the impanelment from a special *venire*. (People v. Prather, 436.)
63. **PLEADING—DEMURRER SUSTAINED TO INFORMATION—ORDER FOR NEW INFORMATION—INDICTMENT.**—Although the court, upon sustaining a demurrer to an information, ordered that another information should be filed, the defendant may nevertheless be presented by indictment for the offense charged in the information without an order of court submitting it to the grand jury. (Id.)
64. **INDICTMENT FOR PERJURY UPON TRIAL FOR LARCENY—EVIDENCE—IMMATERIAL VARIANCE.**—The variance is immaterial between an indictment for perjury, alleged to have been committed upon a trial for grand larceny, under an information described as charging that the property stolen in another county was "feloniously" brought into the county of the venue, and the information placed in evidence which omitted the word "feloniously," while in every other particular the information pleaded and the one proved exactly corresponded. The defendant could not be prejudiced by such variance, for the reason that the word "feloniously" was not necessary to the validity of the information. (Id.)
65. **EVIDENCE—VERDICT AND JUDGMENT IN LARCENY CASE—CURE OF ERROR.**—Whatever error was committed in receiving in evidence the verdict and judgment in the larceny case was cured by taking such evidence away from the jury and instructing them to disregard it. (Id.)
66. **MATERIALITY OF PERJURED TESTIMONY—IDENTIFICATION OF STOLEN PROPERTY.**—The materiality of the alleged perjured testimony, given upon the trial for larceny, appears from proof that it had a strong tendency to weaken the evidence going to the point of identification of the stolen property, which was the vital point in the case. (Id.)
67. **SETTING ASIDE INFORMATION—PRELIMINARY EXAMINATION—TIME TO PROCURE COUNSEL—PRESUMPTION.**—An information will not be set aside for refusal of the magistrate conducting the preliminary examination to grant the defendant further time in which to procure counsel, where it appears that he had been granted one week in which to procure counsel and prepare for the hearing. In the

CRIMINAL LAW (Continued).

absence of evidence to the contrary, it will be presumed that he was duly informed by the magistrate of his right to the aid of counsel in every stage of the proceeding. (*People v. Figueroa*, 159.)

68. **RAPE—EVIDENCE—USE OF DIAGRAM.**—Upon the trial of a defendant accused of rape, it was not objectionable for the prosecuting attorney to draw upon a blackboard a diagram of the scene of the crime and its surroundings, and to prove by a witness familiar with the locality that it was a substantially correct representation thereof, and to use it in the examination of the witness, in the usual way, asking him to state the distances between the objects indicated thereon. (*Id.*)
69. **CONDITION OF PERSON AND CLOTHING OF CHILD—BEST EVIDENCE.**—The mother of a child six years old, charged to have been outraged by the defendant, was entitled, after testifying that within a few minutes after the commission of the crime she inspected the child's person and clothing, to describe their condition. The condition of the clothes at the time of the trial, even if left unwashed, were not the best evidence, or any evidence, of their condition immediately after the outrage. (*Id.*)
70. **COMPLAINT OF CHILD INCOMPETENT TO TESTIFY.**—The general rule that evidence of the complaints of the prosecuting witness, in cases of rape, are only admissible as corroborative of her testimony, does not apply to complaints made by a child six years of age, who is incompetent to testify. In such case, the fact of immediate complaint by the child is admissible, as tending to show her physical condition at that time, though any narrative of what the child said is inadmissible. (*Id.*)
71. **ABSENCE OF EXPERT MEDICAL WITNESS—FAILURE OF SHERIFF TO SERVE SUBPOENA.**—The mere absence of a physician desired by the defendant as an expert witness, owing to the failure of the sheriff to serve a subpoena upon him, is not ground for reversal of the judgment of conviction, where no other effort appears to have been made to have the subpoena served by some other person, and no continuance was asked until the attendance of a physician could be procured. (*Id.*)
72. **REBUTTAL—CONTRADICTION OF WITNESS AS TO CONVERSATION.**—It was proper for the parents of the injured child to testify in rebuttal in contradiction of a witness who testified concerning a conversation between them, about which they were not examined in chief, but which was inconsistent with their original testimony. (*Id.*)
73. **LARCENY OF COW—PARTICIPATION OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—The fact that another person than the defendant was the leading actor in the larceny of a cow, of which the defendant was convicted, cannot relieve the defendant from the verdict against him, where there is evidence that the defendant not only participated in the killing of the cow, but that both parties rode out together into the field where it was, and drove the animal

CRIMINAL LAW (Continued).

- to the corral where it was killed. The subsequent conduct of the defendant in attempting to dispose of the carcass was evidence that his original taking was larcenous. (*People v. Wilder*, 182.)
74. **INSTRUCTIONS REQUESTED BY DEFENDANT—STATEMENT TO JURY NOT PREJUDICIAL.**—The statement to the jury that certain instructions given at defendant's request were asked for by the defendant, is unnecessary; but the defendant could not be prejudiced by such statement. (*Id.*)
75. **DISTRUST OF WITNESS—INSTRUCTION.**—The instruction that "a witness who willfully testifies falsely as to one fact in giving his testimony is to be distrusted in other parts of his testimony," is in substantial accord with the Penal Code. The addition thereto, "If you find that a witness has deliberately testified falsely in one part of his testimony in this case, you have the right to reject the whole testimony of that witness which is not shown by other evidence to be true," though it could well be omitted, leaves the credibility of the witness with the jurors, and is not substantially erroneous. (*Id.*)
76. **CIRCUMSTANTIAL EVIDENCE—INSTRUCTION NOT PREJUDICIAL.**—An instruction that "there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence," and that "a man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow," is of doubtful character, as a declaration of law, but is not prejudicially erroneous. (*Id.*)

CRUELTY. See Divorce, 4, 6-8, 10.

DAMAGES.

1. **ACTION FOR DAMAGE TO LEASEHOLD—EVIDENCE—INTEREST ON MONEY—HARMLESS RULING—MARKET VALUE OF LEASE—INSTRUCTION.**—In an action to recover damages for injury to the plaintiff's leasehold, from the construction of a railroad track, impeding plaintiff's ingress and egress, evidence elicited on the cross-examination of the plaintiff as to what he paid for interest on borrowed money was not admissible as tending to show the rental value of the land; but whether it was admissible on general cross-examination or not, the ruling admitting it was harmless, where the plaintiff testified fully as to the value of the land, and what he paid as rental therefor, and as to the market value of the lease regardless of rental, and where the court instructed the jury that the measure of damages was the market value of the lease. (*Kishlar v. Southern Pacific Railroad Company*, 636.)
2. **ALLEGED INJURY FROM TRACK IN ALLEY—TRACKS ON OPPOSITE LAND OF DEFENDANT—EVIDENCE—INSTRUCTION.**—Where the injury complained of was alleged to have resulted from a railroad track con-
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structed in an alley adjoining the leased property, and there was no averment or offered proof to show that the defendant negligently managed other parallel tracks situated on its own land across the alley, it was proper for the court to exclude evidence as to the number of cars run upon those tracks, and to instruct the jury that the use of the tracks upon the defendant's private land parallel with and contiguous to the alley, by running trains or leaving cars standing thereon, was not an element of damage in the action. (Id.)

3. TIME AND MANNER OF ESTIMATING VALUE OF LEASE—VALUE IN USE TO PLAINTIFF.—It was proper for the court to instruct the jury that they were to estimate the value of the lease at the time when the track complained of was first completed and operated, and that the market value of the lease was not its value in use to the plaintiff for a particular purpose, but only its fair market value. (Id.)

4. AVAILABILITY FOR PARTICULAR USE—MARKET VALUE.—The availability of the property for any particular use may be shown; but where all the facts bearing on the use for which the property was adapted and for which it is used are shown, the question to be considered is, what value in the market could be obtained, if the plaintiff wished to sell his property, from parties who wished to buy and would give its fair value. (Id.)

See Conversion, 1, 2; Deed, 1.

DEBTOR AND CREDITOR. See Contempt; Fraudulent Conveyance; Insolvency; Pledge.

DEDICATION.

1. DEDICATION OF PLAZA—RECORDED PLAT AND MAP—CONVEYANCES OF LOTS—RIGHTS OF PUBLIC—OFFER TO DEDICATE—ACCEPTANCE—REVOCATION.—The description of a plaza upon a recorded map and plat of land, according to which lots were sold and conveyed, whatever rights may be thereby conferred upon the purchasers of lots, only constitutes an offer to dedicate the plaza to public use, so far as the rights of the public are concerned. An acceptance of the offer by the public is essential to constitute a dedication as to it, and the offer may be revoked, as to the public, at any time before its acceptance thereof. (City of Anaheim v. Langenberger, 608.)

2. ACTION BY CITY TO QUIET TITLE—PLEADING—ADVERSE CLAIM—REVOCATION OF OFFER.—Where it appears that the offer to dedicate the plaza was made twenty years before the commencement of an action by the city to quiet title thereto, during which period there was no express or implied acceptance of the offer by the public, and the complaint alleges an adverse claim of the defendant to the land involved, such allegation indicates a revocation of the offer prior to the filing of the complaint. (Id.)

3. FINDING AGAINST DEDICATION—ABSENCE OF PROOF OF ACCEPTANCE.—In the absence of proof of an acceptance by the city of the offer

DEDICATION (Continued).

to dedicate the plaza prior to the commencement of the action, the court was justified in finding that there was no dedication of the plaza to public use. (Id.)

DEED.

1. **DEED OF GRANT—PREVIOUS CONVEYANCE OF WATER RIGHT—BREACH OF IMPLIED COVENANT—DAMAGES.**—A deed of grant, expressly granting a water right as an appurtenance to the land conveyed, implies a covenant against a previous conveyance thereof; and where such water right was appurtenant to the land, when the negotiations for purchase thereof were begun by the grantee, and was conveyed to a third person, prior to such deed of grant, the purchaser is entitled to recover from his grantor the value of the water right, as damages for the breach of such implied covenant. (*Lyles v. Perrin*, 417.)

2. **PLEADING—EVIDENCE OF DEED—IMMATERIAL VARIANCE—DEFECT SUPPLIED BY ANSWER.**—A variance between the complaint and the evidence, as to the deed, is immaterial, if it could not have prejudiced the defendant. Where it appears that the defect in the complaint was supplied by the express allegations of the answer, and that the defendant offered the deed in evidence, he could not be prejudiced by its admission. (Id.)

See Ejectment, 1, 5; Fraudulent Conveyance; Husband and Wife; Mortgage, 6-8, 12; Taxation, 1-4; Vendor and Vendee.

DEMURRER. See Judgment, 2, 3.

DESERTION. See Divorce, 1, 4, 9-14.

DIVORCE.

1. **DESERTION—SUFFICIENCY OF COMPLAINT—ABSENCE OF DEMURRER—OBJECTION UPON APPEAL.**—A complaint for divorce by a wife against her husband, alleging that on a certain day the defendant voluntarily separated himself from the plaintiff, without any fault on her part, and with intent to desert her, and has continued since, and still does continue, to desert her, in the absence of a demurrer for a defective statement of the facts, is not subject to the general objection, upon appeal, that it does not state a cause of action for desertion. (*Sheridan v. Sheridan*, 88.)

2. **DELAY OF FINDINGS—ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.**—A delay of more than six months in the filing of findings, in an action of divorce, after judgment was ordered for the defendant, is not ground for a new trial, and cannot be considered upon appeal from an order denying a new trial to the plaintiff. (*Kepfler v. Kepfler*, 205.)

3. **SUFFICIENCY OF FINDINGS—ULTIMATE FACTS.**—Findings upon the ultimate facts in issue in the action for divorce, as to the grounds of divorce alleged and denied, are sufficient, and decisive of the

DIVORCE (Continued).

case. It is not necessary to find upon facts merely probative of the ultimate facts found. (Id.)

4. **DESERTION—DRIVING PLAINTIFF FROM HOME BY CRUELTY—FINDING AGAINST CRUELTY.**—A finding which negatives every charge of cruelty alleged in the complaint must be treated as negating a charge of desertion by driving the plaintiff from her home by cruelty. (Id.)
5. **SUPPORT OF FINDINGS—CONFLICTING EVIDENCE.**—The testimony of the defendant, in contradiction of that of the plaintiff, is sufficient to support findings for the defendant. (Id.)
6. **EXTREME CRUELTY—DIVISION OF COMMUNITY PROPERTY—DISCRETION OF COURT.**—Where a divorce was granted to the husband, as cross-complainant, on the ground of the extreme cruelty of the wife, who sued for a divorce as plaintiff, the court had discretion to award seven twelfths of the community property, including the homestead, to the defendant, and to award the remaining five twelfths to the plaintiff. (*Gorman v. Gorman*, 378.)
7. **APPEAL—REVIEW OF DISCRETION—EVIDENCE NOT RETURNED.**—Although the discretionary action of the court in such a case is expressly made, by section 146 of the Civil Code, subject to revision upon appeal to this court, yet where the evidence is not in the record, and this court has not "all the facts of the case and the condition of the parties" before it, and cannot say that the division was not just, the action of the superior court in dividing the property will not be disturbed upon appeal of the divorced husband. (Id.)
8. **CONSTRUCTION OF CODE PROVISIONS—LIMITS OF DISCRETION.**—The provisions of section 146 of the Civil Code relating to the division of the community property, where a divorce is granted on the ground of extreme cruelty or adultery, though impliedly requiring that more than half of the community property shall be awarded to the innocent party, does not otherwise limit the discretion of the trial court, in making the award, by any general rule. The proportion should depend upon the particular circumstances of each case. Where the trial court has exercised a legal discretion, this court, though clothed with the power of "revision" under the statute, will be slow to interfere with that discretion. (Id.)
9. **DESERTION—PLEADING—FINDINGS—ULTIMATE AND PROBATIVE FACTS—AGREEMENT FOR SEPARATION—REFUSAL OF RECONCILIATION.**—In an action for divorce on the ground of desertion, the alleged willful desertion of the plaintiff by the defendant is not a conclusion of law, but is the ultimate fact to be pleaded and found; and where there has been a separation of the parties by agreement, an offer of reconciliation, made in good faith by the plaintiff, and the refusal thereof by the defendant, are probative facts, tending to prove desertion, and need not be pleaded and found. (*Howard v. Howard*, 346.)
10. **FORMER CRUELTY OF HUSBAND—IMMATERIAL EVIDENCE.**—Evidence of the former cruelty of the husband in striking the wife, two

DIVORCE (Continued).

years prior to the agreement for separation, and seven years prior to the husband's offer of reconciliation and her refusal thereof, is too remote, and is immaterial to the issue of desertion on her part, alleged as of the date of such offer and refusal. (Id.)

11. **FORMER JUDGMENT.**—The record of a former judgment in an action for a divorce, brought by the husband on the ground of an alleged desertion by the wife, as of a date subsequent to the agreement for separation, and prior to the offer of reconciliation, in which action the husband was defeated, is irrelevant and immaterial to the issue of desertion alleged as of the subsequent date of the offer and refusal. (Id.)
12. **GOOD FAITH OF OFFER—CONFLICTING EVIDENCE—SUPPORT OF FINDING.**—Where the court found, upon conflicting evidence, that the offer of the husband, which the wife refused, was made in good faith, and where, on the face of the testimony, there is enough evidence of good faith to justify the finding, it will not be disturbed upon appeal. (Id.)
13. **SUBSEQUENT OFFER AFTER SUIT BROUGHT—REFUSAL—MATURITY OF ACTION.**—A subsequent offer of reconciliation, made by the plaintiff after suit brought, which was refused, cannot defeat or render premature an action for divorce which was based upon an alleged desertion as of the date of a prior offer and refusal. (Id.)
14. **EFFECT OF ACCEPTANCE.**—An acceptance of subsequent offers within one year after the date of the prior offer and refusal would have defeated the action; but an acceptance after the expiration of the year could not defeat it. (Id.)

See *Bona Fide Purchaser; Mortgage*, 14.

DRAFT. See *Negotiable Instruments*, 1-5.

EJECTMENT.

1. **ACTION TO QUIET TITLE—DEED VOID FOR FRAUD—EVIDENCE—FORMER JUDGMENT IN EJECTMENT—ESTOPPEL.**—In an action to quiet plaintiff's title to land, as against a deed fraudulently procured by his wife and her son, while plaintiff was incapacitated, a judgment in ejectment against the plaintiff in a former action, brought against the wife and the tenant of the administratrix of a deceased son, to whom the premises were conveyed by the wife, with notice of the fraud, and the administratrix, in her personal capacity, who was not in possession of the land, is not admissible in evidence as an estoppel against the plaintiff, in favor of the administratrix and a child of the deceased son. (*Loftis v. Marshall*, 394.)
2. **ADJUDICATION IN EJECTMENT—DEFENDANT NOT IN POSSESSION.**—An adjudication in ejectment, in favor of a defendant who was not in possession of the property, does not involve the question of the plaintiff's title, as to such defendant, and could not estop the plaintiff to show that he had title, in an action to quiet his title against such defendant. (Id.)

EJECTMENT (Continued).

3. **JUDGMENT IN FAVOR OF TENANT—ESTOPPEL IN FAVOR OF LANDLORD—PARTIES.**—A judgment in ejectment, in favor of a tenant, is not conclusive as an estoppel in favor of the landlord, against the plaintiff in ejectment, unless the landlord appeared openly in the case, and was permitted by the court to undertake the defense to the action, so as to have control of the case as a party thereto; and the fact that the tenant was represented by an attorney employed by the landlord is not sufficient to establish the estoppel. (Id.)
4. **LANDLORD AND TENANT—ATTORNMEN.**—The holder of the legal title may maintain ejectment against a tenant who has denied his title and wrongfully attorned to another claimant, who has no title to the demanded premises. (Wise v. Eveland, 617.)
5. **ATTORNMEN TO DIVORCED WIFE—INJUNCTION AGAINST HUSBAND—EXCEPTION OF "ORDINARY BUSINESS"—DEED TO PLAINTIFF TO PAY DEBT.**—Where the defendant had attorned to a divorced wife, who had sold her husband's property in a divorce suit, in which the husband had been enjoined from disposing of his property pending the suit, with the exception that he might carry on his "usual and ordinary business," and the court found against the defendant on the denials of his answer, and on the defense of attornment found that the husband had, pending such suit, conveyed the property in dispute to the plaintiff, without fraud, to pay a *bona fide* debt, such finding shows title in the plaintiff, and not in the wife, and the attornment of the defendant to her is not a sufficient defense. (Id.)

See Bond; Homestead, 1; Public Lands, 3

ELECTION.

1. **ELECTION BALLOTS—IDENTIFYING MARKS—PURPOSE OF STATUTE.**—The purpose of the provision of section 1215 of the Political Code, that "no voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him," is to destroy the identify of the ballot, and thereby maintain its secrecy, which is one of the cardinal principles on which the present ballot law is founded. It is intended to cover any mark made by the voter which may serve as a distinguishing mark, whether made with the legally authorized stamp, or with an ordinary pen or pencil. (Farnham v. Boland, 151.)
2. **USE OF AUTHORIZED STAMP—COMPLIANCE WITH LAW.**—If, in the use of the authorized stamp, the voter keeps within the law, the ballot will not be rejected, even though the stamp has been so used that the cross may be an identifying mark, and the ballot should not be rejected for trivial reasons; but the court will do the best it can to hold the voter to a strict compliance with the statute forbidding identifying marks with the use of the stamp. (Id.)
3. **UNAUTHORIZED USE OF STAMP—BALLOTS REJECTED.**—Ballots must be rejected where, by an unauthorized use of the stamp, a cross is placed in a square opposite which there is no candidate's name,

ELECTION (Continued).

or upon a line between two squares, each of which is also properly marked, or where two crosses are placed after a candidate's name, either one within the square and one outside of it, or two within the square, whether separate or interlaced. Each and all of such marks are identifying marks by the voter, prohibited by the statute. (Id.)

4. **BALLOTS WITH STUB OR NUMBER ATTACHED—CARELESSNESS OF ELECTION OFFICERS—VOTER NOT PREJUDICED.**—The law only forbids identifying marks made by the voter; and ballots cast with the stub attached, which should have remained in the ballot-book, or bearing the number which it was the duty of the election officers to remove, should not be rejected. The malconduct or carelessness of the election officers in the discharge of their duty cannot prejudice the voter, where a fair election and honest count are not thereby prevented. (Id.)

5. **ELECTION CONTEST—REVIEW UPON APPEAL—EXCEPTIONS—ADMISSION OF BALLOTS FOR APPELLANT—PRACTICE—DECISION.**—Upon appeal in an election contest, where the appellant assigns error in the admission of ballots cast for the respondent, it is proper practice for the respondent to have inserted in the bill of exceptions the exceptions taken to the rulings of the court in the admission of ballots cast for the appellant. Where the whole case is not presented in the record upon the appeal, if error appears in favor of the appellant, this court, in deciding the case, will not render or order final judgment, but will remand the case for a new trial. (Id.)

EMBEZZLEMENT. See Criminal Law, 13-25.

EMINENT DOMAIN.

1. **ACTION TO CONDEMN LAND FOR RAILROAD—PLEADING—CONSTRUCTION OF CODE.**—A railroad company organized to construct and operate a steam-railroad to carry passengers and freight for hire, is a common carrier, and is authorized by the Code of Civil Procedure to condemn land for its use; and it need not aver in its complaint that it was organized for "public transportation," as mentioned in subdivision 4 of section 1238 of the Code of Civil Procedure. The clause in which those words occur was intended to qualify only the words, "canals, ditches," and has no application to railroads. (*San Francisco and San Joaquin Valley Ry. Co. v. Leviston*, 412.)
2. **LOCATION, GENERAL ROUTE, AND TERMINI OF ROAD—CERTAINTY.**—A complaint showing an incorporation for the purpose of constructing a railroad, "commencing at the city and county of San Francisco," and "running in a general easterly direction to Stockton, and thence in a general easterly and southerly direction to a point in the vicinity of Bakersfield," shows the location, general route, and termini of the road with sufficient certainty. (Id.)

EMINENT DOMAIN (Continued).

3. **FINDINGS—ADMISSIONS—EVIDENCE—ERROR WITHOUT PREJUDICE.**—Where the court, in the action to condemn land, found that all of the allegations of the complaint were true, and the findings of the court and verdict covered all of the issues, and were sustained by the evidence, an erroneous finding, that certain allegations of the complaint were admitted by the defendant in open court, is not prejudicial to the defendant. (Id.)
4. **INTEREST—COSTS—CONDITION OF CONDEMNATION.**—The code does not provide for interest on the verdict; and does not require the payment of costs as a condition of the final order of condemnation. The only condition imposed is the payment of the sum of money assessed, within thirty days after final judgment, and that excludes any other condition. (Id.)
See *Ferries*, 2.

EQUITY. See *Counties*, 10; *Specific Performance*; *Trust*.

ESTATES OF DECEASED PERSONS.

1. **WILL—CONTEST OF PROBATE—SPECIAL VERDICT—ANSWERS TO QUESTIONS—ULTIMATE FACTS—AUTHENTICATION.**—Upon a contest of the probate of a will, it is proper for the court to submit to the jury questions relating only to the ultimate facts to be found, covering the issues growing out of the contest; and the embodiment of such questions and the answers thereto as the verdict of the jury, followed by a certificate signed by the foreman, showing that the jury "do find the foregoing facts and verdict," constitutes a special verdict of the jury properly authenticated. (*Estate of Keithley*, 9.)
2. **EVIDENCE—MENTAL CAPACITY OF TESTATOR—QUALIFICATION OF WITNESSES—INTIMATE ACQUAINTANCES—DISCRETION.**—The qualification of witnesses, as "intimate acquaintances," to testify to the mental capacity of the testator leaves the question of sufficient acquaintance largely in the discretion of the court; and its ruling thereupon will not be disturbed upon appeal, unless there is a clear abuse of discretion. (Id.)
3. **APPEARANCE AND ACTION OF TESTATOR AT PARTICULAR TIME.**—Any witness acquainted with the fact may testify as to the appearance, demeanor, and action of the testator at a particular time, and as to whether, at that time, he acted rationally, or appeared rational to the witness. (Id.)
4. **INSTRUCTIONS—PRACTICE.**—It is better practice that instructions should not be numerous, and that those given should be as simple and plain as possible, and cover the issues, so that the jury may fully understand them. (Id.)
5. **PROBATE OF WILL—DESTROYED OLOGRAPHIC WILL—SIGNED COPY—FRAUDULENT DESTRUCTION NOT SHOWN.**—An olographic will destroyed in the lifetime of the testator cannot be admitted to probate, if not "fraudulently destroyed." Such a will, if destroyed by a friend in the presence of the testator, as being in his expressed

ESTATES OF DECEASED PERSONS (Continued).

- opinion, of no further use after the testator had, under the friend's advice, executed a typewritten copy, signed by the friend as a witness, was not "fraudulently destroyed," within the meaning of section 1339 of the Code of Civil Procedure. (Estate of Johnson, 662.)
6. **FRAUD—UNTRUE ASSERTION—MATTER OF OPINION.**—The "assertion of that which is not true," in order to constitute fraud, under subdivision 2 of section 1572 of the Code of Civil Procedure, must be of some *fact* not warranted by the information of the person making it, and cannot be held to include the opinion of the person, however erroneous it may be, or however positively asserted. (Id.)
7. **FEES PAID UNDER MISTAKE OF LAW—UNCONSTITUTIONALITY OF AD VALOREM FEES—ACTION BY DISTRIBUTE.**—Fees paid by an executor to the county clerk on the appraised value of the property of the deceased testator, under the act of March 28, 1895, which was subsequently held unconstitutional by this court, as to such fees, cannot be recovered back from the city and county because of such subsequent decision. The payment was according to the understanding of the parties as to the law prevailing at the time, and the subsequent decision by this court does not create such a mistake of law as a court will rectify. (Wingerter v. City and County of San Francisco, 547.)
8. **POSSESSION OF REALTY—RIGHTS OF HEIRS.**—Though the heirs of a deceased person, prior to distribution, have no right of possession and control of the realty as against the administrator, yet, as against strangers who do not claim under the administrator, the heir is entitled to the possession of lands belonging to the estate. (Berry v. Eyraud, 82.)
9. **UNDIVIDED INTEREST—DISTINCT LEASES BY DIFFERENT HEIRS—OIL LEASE—COVENANT AGAINST SALOON—LEASE FOR SALOON.**—Where the decedent owned an undivided third interest in land, and one heir only joined with the other owners in a lease thereof as oil-land, covenanting with the lessees not to build a saloon thereupon, the remaining heirs are entitled to be let into possession jointly with the lessees, who do not claim under the administrator, and may lease to third parties the right to build a saloon upon the premises, which does not directly disturb the operations of the first lessees. (Id.)
10. **INJUNCTION—MENACE TO OIL PROPERTY.**—Whatever rights of injunction the first lessees may have against their lessors for breach of their covenant, they cannot enjoin the lessees of the other heirs from maintaining the saloon, on the alleged ground that it is a menace and danger to their oil-tanks and other inflammable property, with which it does not directly interfere. (Id.)
11. **ATTORNEY FOR NON-RESIDENTS—POWER OF COURT—DESIGNATION IN ORDER.**—Before the court can make an order appointing an attorney for non-resident devisees, legatees, heirs, or creditors of a deceased person, the court must be satisfied that such persons exist, and the order must designate who they are, and if their names are

ESTATES OF DECEASED PERSONS (Continued).

not known, they must still be identified in some mode in the order. (Estate of Lux, 3.)

12. **NON-RESIDENT REPRESENTED BY HIS ATTORNEY—FUNCTIONS OF APPOINTEE.**—The court cannot appoint an attorney for a non-resident party who is already represented by his own attorney; and whenever he is represented by an attorney employed by himself, the functions of the appointee cease. (Id.)
13. **COMPENSATION OF APPOINTEE—PAYMENT BY PERSONS REPRESENTED.**—The compensation of an attorney appointed by the court to represent non-resident persons interested in the estate is to be paid only on account of the interest of the persons represented, and nothing should be paid out of the estate for persons named, who turn out to have no interest in the estate. (Id.)
14. **STIPULATED FEE—VOID ORDER FOR COMPENSATION—FINAL ALLOWANCE.**—Where an attorney, appointed to represent absent heirs, agreed with them for a stipulated fee, he can thereafter recover from them no greater sum. The court had no jurisdiction to make a contract for the absent heirs; and an order made, fixing a quarterly compensation to be paid to such attorney each quarter-year during administration, was void. The final allowance of the fee was in the discretion of the court, and was to be judicially determined by the court, after knowledge of the facts. (Id.)
15. **PARTIAL DISTRIBUTION—PETITION BY WIDOW—CONTINUANCE—APPEAL FROM JUDGMENT—ESTOPPEL.**—Upon petition by the widow for partial distribution of real property of her deceased husband, alleging that the property was community property, and that under the will she had a life estate in the interest devisable by her husband, an application for a continuance by a grantee of one of the devisees, on the ground that an appeal was pending from a judgment adjudging that she had only a life estate in the entire property, in an action brought by such grantee to cause the executrix widow and other devisees to make redemption of such real property from a sale under the foreclosure of a mortgage thereupon, or be forever barred from such right, was properly denied. Such judgment, if it should be affirmed, could not be pleaded or admitted in evidence as an estoppel upon the widow to claim more than a life estate upon distribution of the estate. (Estate of Freud, 333.)
16. **ACTION TO FORECLOSE RIGHT OF REDEMPTION—TITLE INCIDENTALLY INVOLVED.**—In the action to compel redemption, or a foreclosure of the right of the defendants to redeem the property, the respective rights of the parties in the property were only incidentally involved. The executrix could make the redemption to protect the estate, and where she did so, the judgment fixing the rights of the devisees to contribute toward the redemption could not be a conclusive adjudication of their respective interests in the property of the estate. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

17. **EXCLUSIVE JURISDICTION OVER ESTATE.**—The court, in the action to foreclose the right of redemption, had no jurisdiction to determine the matter involved in a distribution of the estate of the decedent. The court, having probate jurisdiction over the estate, has exclusive jurisdiction over the question of distribution thereof, and to determine the interests of the distributees in the property distributed. (Id.)
18. **IMPROPER DECREE OF PARTIAL DISTRIBUTION—ORDER OF SALE—APPEAL.**—A decree of partial distribution of real property is improper, where the court has ordered such property to be sold to pay debts and the expenses of administration. The fact that such order is suspended by an appeal would not justify a distribution which would defeat the order of sale if it should be affirmed. (Id.)
19. **ACTION UPON CLAIM—TORT OF TESTATOR AGAINST INTESTATE—AGREED PROVISION IN WILL—SATISFACTION—PRIOR DEATH OF INTESTATE.**—Where a wrong done by a deceased testator against a deceased intestate was settled by an agreement between them that the former should make provision in his last will in satisfaction thereof, and the agreement was fully performed in the last will of the testator, the claim for the tort was thus extinguished; and the fact that the person wronged died intestate before the death of the testator cannot justify the presentation of a claim by the administrator of the deceased intestate against the estate of the deceased testator, or support an action upon such claim. (*Drinkhouse v. Merritt*, 580.)
20. **REMEDY UNDER WILL IN PROBATE JURISDICTION.**—If the estate of the deceased intestate has any interest in the estate of the deceased testator, it exists by virtue of the will of the latter, and is the appropriate subject of probate jurisdiction in the administration and distribution of that estate; and the sole remedy of the administrator of the intestate is to be sought in that jurisdiction, under the will of the testator. (Id.)
21. **CLAIM—MATURITY OF CONTRACT—STATUTE OF LIMITATIONS.**—A claim against the estate of a deceased woman, for services rendered to her in her lifetime, which were agreed to be paid for out of the proceeds of the sale of certain parcels of real estate, which remained unsold at her death, shows no matured cause of action against the decedent in her lifetime, and cannot be barred by the statute of limitations, which did not begin to run until the claim could be enforced. (*Thompson v. Orena*, 26.)
22. **CERTAINTY OF CLAIM—REAL ESTATE NOT DESCRIBED.**—The claim against the estate of the decedent was not rendered void for uncertainty, because not describing the real estate, the proceeds of the sale of which were therein referred to as "arising from the sale of certain pieces of real property belonging to said decedent," which remained unsold at the time of her death. The only necessity for any reference to the land was to show that the claim was not barred

ESTATES OF DECEASED PERSONS (Continued).

by the statute, and the description of the land was not essential for that purpose. (Id.)

23. **ACTION UPON CLAIM—PLEADING OF PARTICULAR DETAILS.**—In an action upon the claim, it is necessary to plead particular details, which are not required to be inserted in a presented claim upon a demand which is due; but even if the details alleged be more particular than is necessary, if the complaint is upon the same cause of action set out in the claim, sets forth the same services, and states the same agreement referred to in the claim, it will support a recovery thereupon. (Id.)
24. **SERVICES RENDERED PRIOR TO AGREEMENT—STATUTE OF LIMITATIONS—SUBSEQUENT ORAL PROMISE.**—With respect to services rendered prior to the making of the contract claimed, the statute of limitations began to run as soon as they were performed, in the absence of any agreement as to the time or manner of payment therefor; and the cause of action therefor could not be taken out of the operation of the statute by any subsequent oral promise as to a future time or mode of payment. (Id.)
25. **EVIDENCE—MEMORANDUM-BOOK OF DECEDENT.**—A private memorandum-book of the decedent, containing items of money collected and paid out, including items paid to plaintiff, is not admissible in evidence against the plaintiff; and if admitted, it was properly stricken out on plaintiff's motion. (Id.)
26. **ACTION BY EXECUTORS—EVIDENCE—LETTERS TESTAMENTARY.**—In an action by executors, the introduction in evidence of the letters testamentary is sufficient evidence of the death of the party entitled to sue, and of an order appointing the plaintiffs as his executors. (Garthwaite v. Bank of Tulare, 237.)
See Appeal, 14; Bond, 1; Corporations, 1-4; Homestead, 4-6; Mechanic's Liens, 1; Will.

ESTOPPEL.

1. **ESTOPPEL IN PAIS—NEW MATTER—PLEADING.**—An estoppel *in pais*, arising from the conduct and representations of the plaintiff, is new matter, and the facts constituting it must be specially pleaded, in order to be relied on in bar of the action. (Newhall v. Hatch, 269.)
2. **SILENCE IN FORMER ACTION NOT AN ESTOPPEL.**—The mere silence of the plaintiff in the former action, in not stating the fact of the renewal of the note secured by the deed, and his merely allowing judgment to go against him, without an amendment of the complaint setting up such fact, does not constitute an estoppel *in pais*, which could preclude the statement of the fact of such renewal in a new action. The plaintiff owed no duty to the judgment creditor of the mortgagor to inform him of that fact in the prior action. (Id.)

ESTOPPEL (Continued).

See *Bona Fide Purchaser*, 4; *Corporations*, 9-11; *Ejectment*, 1-3; *Estates of Deceased Persons*, 15; *Mortgage*, 7, 17; *Statute of Frauds*, 2; *Trust*.

EVIDENCE.

IMPEACHMENT OF WITNESS—PARTICULAR WRONGFUL ACTS—CROSS-EXAMINATION—COLLATERAL STATEMENTS CONCLUSIVE.—A witness cannot be impeached by evidence of particular wrongful acts; and his collateral statements, elicited on cross-examination, relative to such acts, and to his declarations concerning the same, not included in his examination in chief, and wholly outside of the issues, are conclusive, and cannot be contradicted by other witnesses. (*Steen v. Santa Clara Valley Mill and Lumber Company*, 355.)

See *Attorney at Law*, 4; *Bond*, 3; *Community Property*, 1, 4-6; *Corporations*, 9-13; *Criminal Law*, 1-10, 17-21, 27-29, 31, 33, 39-42, 52-59, 64-66, 68-73, 76; *Damages*, 1, 2; *Divorce*, 7, 12; *Eminent Domain*, 3; *Estates of Deceased Persons*, 2, 3, 25, 26; *False Imprisonment*, 3; *Eminent Domain*, 2, 4; *Findings*, 1; *Fraudulent Conveyance*, 3; *Judgment*, 13, 14; *Landlord and Tenant*; *Negligence*, 6, 9, 11, 13, 14, 20, 31, 35, 36; *Partnership*; *Public Lands*, 4, 5; *Sales*, 4, 5; *Taxation*, 3, 4.

EXECUTION. See *Appeal*, 1, 2.

EXECUTORS AND ADMINISTRATORS. See *Estates of Deceased Persons*.

FALSE IMPRISONMENT.

1. **MISTAKEN IDENTITY—IDENTIFYING PERSON NOT LIABLE.**—One who, without malice, but acting under an honest mistake as to the identity of a party, erroneously identifies such person to an arresting officer, who thereupon takes him into custody, is not liable for the false imprisonment, if he in no other manner either aided or assisted in the wrongful arrest, or directed, requested, or advised the officer to make it. (*Miller v. Fano*, 103.)
2. **LIABILITY OF ARRESTING OFFICER—CARELESS ARREST OF INNOCENT PERSON.**—A police-officer who makes an arrest must use prudence and diligence to find out if the party arrested is the party described in his warrant, and if he willfully or carelessly arrests an innocent party, he is liable for false imprisonment. (*Id.*)
3. **EVIDENCE—CIRCUMSTANCES OF UNLAWFUL IMPRISONMENT.**—In an action for such false imprisonment, all the facts and circumstances connected with his unlawful imprisonment, including his treatment while in the custody of other police officials, to whom he had been surrendered, are admissible in evidence. (*Id.*)

FEES. See *Estates of Deceased Persons*, 7.

FERRIES.

1. **FERRY FRANCHISE—RIVER BETWEEN COUNTIES—SALE TO HIGHEST BIDDER NOT REQUIRED—APPLICATION OF STATUTE.**—The act of 1893 (Stats. 1893, p. 288) requiring the sale of franchises to the highest bidder does not apply to a franchise for a ferry over a river between two counties; but such franchise is regulated by sections 2843 et seq. of the Political Code, the provisions of which are not repealed, either expressly or by implication, by the act of 1893. (Pool v. Simmons, 621.)
2. **ACTION TO CONDEMN LAND FOR FERRY—EVIDENCE—PUBLIC USE—DETERMINATION OF SUPERVISORS CONCLUSIVE.**—In an action to condemn land for a ferry-landing, under a franchise over a river between two counties, granted by the board of supervisors of the proper county, testimony for the defendants, to show that the ferry was not a public use, is not admissible. The determination by the board, upon evidence adduced before it, that the ferry was a public necessity, is conclusive in such action. (Id.)
3. **NOTICE OF HEARING OF APPLICATION—AFFIDAVIT OF PUBLICATION—PRINCIPAL CLERK.**—An affidavit of publication of the notice of hearing of the application for the franchise was properly made by the principal clerk, who is shown by the affidavit to have charge of all the advertisements in the paper. (Id.)
4. **CONTEST OF APPLICATION—LOCATION OF FERRY—DETERMINATION OF BOARD—EVIDENCE.**—Where it appears that the defendants appeared before the board and contested the application for the ferry franchise, and had a full hearing after notice given, the questions as to whether the location of the ferry by the board would best subserve the use of the public and be least injurious to the defendants, were for the determination of the board upon such hearing, and evidence thereupon is not admissible for the defendants in an action to condemn their land for the ferry. (Id.)
5. **VENUE OF ACTION—RIGHT OF CONDEMNATION.**—The action to condemn the land was properly brought in the county in which the land was situated; and the grant of the ferry franchise, properly made to the plaintiffs by the board of supervisors of the other county as provided by law, gave to them the right to maintain the action. (Id.)

FILING PAPERS. See Appeal, 3-7.

FINDINGS.

1. **DECISION BY DIFFERENT JUDGE—STIPULATION—REVIEW UPON APPEAL—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.**—A judge other than the trial judge, who passes upon the evidence stands in the shoes of the trial judge; and the fact that the judge who, by stipulation of the parties, decided the cause and made the findings was not the one before whom the witnesses appeared at the trial cannot change the presumptions, upon appeal, in favor of the decision of the trial court, nor affect the rule that this court will not

FINDINGS (Continued).

disturb a finding, if the evidence relating thereto is substantially conflicting, nor unless there is either an entire absence of evidence to support it, or so slight evidence as to show an abuse of discretion. (*Blood v. La Serena Land and Water Co.*, 361.)

2. **CONSTRUCTION—GENERAL AND SPECIAL FINDING.**—A general finding that certain averments of the complaint are true will be controlled by a special finding inconsistent with such general finding. (*McCormick v. National Surety Co.*, 510.)

See Divorce, 2-5, 9; Eminent Domain, 3; Husband and Wife, 3, 5; Partnership; Pleadings, 1; Pledge, 2.

FORGERY. See Negotiable Instruments, 7, 10.

FRANCHISE. See Ferries.

FRAUD. See Estates of Deceased Persons, 5, 6.

FRAUDULENT CONVEYANCE.

1. **UNRECORDED DEED OF GIFT TO WIFE—FRAUD UPON SUBSEQUENT CREDITORS OF HUSBAND.**—A deed of gift by a husband to his wife, which was fraudulent in its inception and was made and left unrecorded for the express purpose of defrauding his subsequent creditors, by obtaining future credit upon the property as his own, is void as to subsequent creditors so defrauded. (*Bush & Mallett Co. v. Helbing*, 676.)
2. **TEST OF INVALIDITY—FRAUD OF GRANTOR—INNOCENCE OF GRANTEE IMMATERIAL.**—The test of the invalidity of such deed of gift is the fraudulent motive on the part of the grantor; and the innocence or want of knowledge of the fraud on the part of the grantee is immaterial. The grantee, however innocent, cannot retain the fruits of a voluntary fraudulent transfer. (*Id.*)
3. **EVIDENCE—ACTS AND DECLARATIONS OF GRANTOR AFTER DEED, AND BEFORE RECORD—ABSENCE OF NOTICE BY GRANTEE.**—In an action by a creditor, who relied upon the possession and apparent ownership of the husband in contracting for materials to improve the property, while the deed to the wife remained unrecorded, evidence is admissible to show that after the transfer, and before the record of the deed, the husband had supervision and charge of the property as his own, and exercised acts of ownership, over the same in his own name, and showed the property to the plaintiff, and told him that he owned it, and that the wife told no one about the deed until the day before it was recorded. (*Id.*)
4. **ABSENCE OF RECORD A BADGE OF FRAUD.**—The fact that the deed was kept secret and not recorded, in such a case as this, is a very potent badge of fraud. (*Id.*)
5. **SUFFICIENCY OF COMPLAINT—STATUTE OF LIMITATIONS—IGNORANCE OF FRAUD.**—Where the plaintiff alleged a fraud, committed by inducing him to sign a deed while incapacitated from drunkenness,

FRAUDULENT CONVEYANCE (Continued).

- and upon the false representation that it was a letter, and that in pursuance of the conspiracy and the fraudulent and deceitful acts of the persons who committed the alleged fraud, plaintiff was kept in ignorance of the grant or deed until a date less than three years before the commencement of the action, the complaint sufficiently alleged the discovery of the fraud within that period. (*Loftis v. Marshall*, 394.)
6. **IGNORANCE OF SUBSEQUENT DEED AND RECORD.**—It was not necessary for the plaintiff to aver ignorance of the subsequent deed from plaintiff's wife to her son, nor ignorance of the recording thereof. (*Id.*)
7. **DISCOVERY OF FRAUD NOT MATERIAL—VOID DEED—LIMITATION—ADVERSE POSSESSION.**—Assuming the fraudulent deed to be void, the discovery of the fraud was not material, and an action could be brought at any time, except as against an adverse possession of five years. (*Id.*)
8. **MORTGAGE—DEED OF THIRD PARTY PROCURED BY FRAUD OF DEBTOR—SECURITY FOR PRE-EXISTING DEBT—INNOCENT CREDITOR NOT PROTECTED.**—An innocent creditor, who, without knowledge of the fraud of his debtor, accepts as security for a pre-existing debt a deed fraudulently procured by his debtor to be made from a third party to the creditor, under an agreement by the debtor that he was to secure a loan thereon from the creditor for the use of such third party, and was to return the deed or a reconveyance if the loan was not obtained and delivered to the third party within a time specified, has suffered no loss by reason of the deed, and cannot enforce it as a mortgage for the pre-existing debt of his debtor against the third party. (*Macdonald v. Cool*, 502.)
9. **AGENCY DEFINED IN RECEIPT—OSTENSIBLE AGENCY.**—The agency of the debtor for such third party having been specifically defined in the receipt for the deed, the creditor cannot rely upon any ostensible agency by reason of the delivery of the deed to his debtor, but if dealing with the debtor as an agent of such third party, was put upon inquiry as to the terms of the agency. (*Id.*)
10. **INAPPLICABLE MAXIM—LOSS OF ONE OF TWO INNOCENT PARTIES.**—The maxim that where one of two innocent parties must suffer loss, it is to be borne by the one whose fault or neglect occasioned the loss cannot apply where no loss was occasioned to the other party by such fault or neglect. (*Id.*)
11. **MISTAKE BETWEEN INNOCENT PARTIES—CONSIDERATION.**—The deed fraudulently procured by the debtor from the third party to the creditor was as between the innocent parties, an entire mistake, which vitiates it as a mortgage as between them for the pre-existing debt of the debtor to the creditor; and the question is not whether there was such consideration as would support a contract. (*Id.*)

See Ejectment, 1.

GIFT. See *Fraudulent Conveyance*, 1-4; *Husband and Wife*, 1-3.

GRANTOR AND GRANTEE. See *Deed*; *Vendor and Vendee*.

GUARDIAN AND WARD.

MISAPPROPRIATION BY FATHER.—A father, who is the guardian of the estate of his minor child, who misappropriates it to his own use, is properly charged therewith in his account, and cannot claim credit for expenses paid by him for the maintenance of the child after such misappropriation. (*Estate of Ceas*, 114.)

See *Insane Persons*, 5, 8.

HOMESTEAD.

1. **EJECTMENT—PLEADING—STATEMENT OF "COST" VALUE.**—In an action of ejectment by a wife to recover the possession of a homestead, of which the husband had made a lease without her signature, where the complaint set forth a copy of the declaration of homestead, attached as an exhibit to the complaint, which purported to state the actual "cost" value of the property, instead of its actual cash value, as required by the statute, such complaint does not state a cause of action, and a demurrer thereto should have been sustained. (*Tappendorff v. Moranda*, 419.)
2. **COMPLIANCE WITH HOMESTEAD LAW ESSENTIAL.**—The right to a homestead, with the privileges and immunities incident thereto, is of statutory creation, and exists only upon compliance with the requirements of the statute. (*Id.*)
3. **AMENDMENT OF COMPLAINT—SERVICE—IMPROPER JUDGMENT BY DEFAULT.**—The amendment of the complaint so as to conform to the declaration of homestead, which in fact stated the actual cash value of the premises, was in matter of substance, and had the effect to set aside a default of the defendant, previously entered, and no judgment by default could be entered upon the amended complaint without proof of service thereof upon the defendant, and a default thereafter occurring. The court erred in rendering judgment against the defendant without proof of such service. (*Id.*)
4. **ESTATES OF DECEASED PERSONS—PROBATE HOMESTEAD—FARMING-LAND WITHOUT DWELLING.**—Farming-land upon which there is no dwelling, and which had not been lawfully claimed as a homestead, and was not lived upon at the time of the husband's death, cannot be set apart to the widow as a probate homestead, by the superior court, under section 1465 of the Code of Civil Procedure. (*Estate of Gallagher*, 96.)
5. **BURNED DWELLING NOT REBUILT—INVALID CLAIM OF HOMESTEAD—OFFER OF WIDOW TO REBUILD.**—Though the spouses formerly lived for many years upon the farming-land in question, in a dwelling-house thereupon, which was destroyed by fire several years prior to the husband's death, and never rebuilt; and though the wife, while they were living upon the land, filed an invalid claim of homestead

HOMESTEAD (Continued).

thereupon, which she believed to be valid; and though as widow, when applying for the homestead, she offered to rebuild the burned dwelling,—none of these facts can affect the legal question involved, or justify the superior court in setting apart to the widow, as a probate homestead, the bare farming-land, which was neither occupied as a home, nor suitable to be a home, at the time of the husband's death. (Id.)

6. NATURE OF HOMESTEAD RIGHT—STATUTE LAW—JUSTICE NOT CONSIDERED.—A homestead right is a creation of modern statute law, and can only be acquired in substantial compliance therewith. The question whether it would be just to set apart a probate homestead, which the law does not permit, cannot be considered. (Id.)

HUSBAND AND WIFE.

1. COMMUNITY AND SEPARATE PROPERTY—PRESUMPTION—GIFT FROM HUSBAND TO WIFE—CONVEYANCE BY THIRD PARTY.—The presumption that property acquired by either spouse during marriage is community property cannot apply where the transaction was, in effect, a gift from the husband to the wife, and the conveyance was made to her with the husband's consent, by a third party, in pursuance of the husband's agreement with the grantor for an exchange of his separate property for the lot deeded by him. (Hamilton v. Hubbard, 603.)
2. PAYMENT OF CONSIDERATION—RESULTING TRUST NOT PRESUMED—PRESUMPTION OF ADVANCEMENT OR GIFT.—The presumption of a resulting trust in favor of one who advances the consideration for a conveyance taken in the name of another, only applies between strangers to each other, and does not apply where the conveyance is to any person for whom the person paying the consideration is under some natural, moral, or legal obligation to provide. In such case, the presumption is, that the purchase and conveyance was intended to be an advancement or gift for the benefit of the nominal purchaser or grantee. (Id.)
3. FINDING AGAINST EVIDENCE.—A finding that property proved to have been deeded to the wife by a third party, at the husband's request, in exchange for the separate property of the husband, conveyed to the grantors, is the community property of the husband and wife, is against the evidence. (Id.)
4. INJUNCTION AGAINST DISPOSITION OF HUSBAND'S PROPERTY—EXCEPTION OF "ORDINARY BUSINESS"—DEED IN GOOD FAITH TO PAY DEBT—PRESUMPTION.—An injunction restraining the defendant in a divorce suit from disposing of his property, real or personal, pending the suit, excepting that he was permitted to carry on his usual and ordinary business, will, in the absence of proof to the contrary, be presumed to include within the exception of "ordinary business" a conveyance made in good faith by the defendant to pay an honest debt, of long standing, to a creditor, who accepted the same in good faith, in satisfaction of his demand. (White v. Wise, 613.)

HUSBAND AND WIFE (Continued).

- 5. SPECIFIC FINDINGS—INCORRECT CONCLUSION OF LAW—VIOLATION OF INJUNCTION—RIGHT TO JUDGMENT.**—In an action involving the validity of such deed, where the court made specific findings as to the absence of fraud, and as to the good faith of the parties to the conveyance made and taken in satisfaction of such debt, a further finding made, that the transaction was not in the ordinary course of business, and was in violation of the injunction, and void, must be regarded as of a mere conclusion of law incorrectly drawn from the specific facts found, and inconsistent therewith, and the holder of the deed is entitled to judgment upon the findings. (Id.)

See *Bona Fide Purchaser*; *Community Property*; *Divorce*; *Ejectment*, 5; *Fraudulent Conveyance*, 1-3; *Specific Performance*, 2.

INFANTS. See *Guardian and Ward*.

INJUNCTION. See *Estates of Deceased Persons*, 10; *Husband and Wife*, 4, 5; *Water and Water Rights*, 2.

INSANE PERSONS.

- 1. SUPPORT OF INSANE ADULT SON—COMMON LAW—STATUTORY ACTION AGAINST FATHER—REMEDY.**—The right to maintain an action against a father for the support of his insane adult son did not exist at common law; and if it exists in this state, it is purely a creation of statute, and the remedy therefor must be only that expressly provided for in the statute. (*Napa State Hospital v. Flaherty*, 315.)
- 2. REPEAL OF REMEDY—LOSS OF RIGHT.**—If the remedy for a right created solely by statute is repealed while the right is still inchoate, and not reduced to possession or judgment, the right is thereby lost, provided the repealing statute does not contain a saving clause. (Id.)
- 3. IMPROPER ACTION BY TREASURER OF STATE HOSPITAL.**—The treasurer of the Napa State Hospital has no statutory power to maintain an action in the name of the hospital to compel payment by a father for the support of his insane adult son at the former insane asylum. If the right of action against the father, under section 8 of the *Insanity Law of 1889* (Stats. 1889, p. 330), has not been repealed by the *Insanity Law of 1897*, it can only be enforced by the board of trustees or managers of the hospital, as the successors of the board of trustees of the insane asylum. (Id.)
- 4. ACTION FOR DEMAND ACCRUING TO HOSPITAL—WANT OF JURISDICTION OF SUPERIOR COURT.**—The right given to the treasurer of the state hospital to recover upon any cause of action accruing to the hospital cannot sustain an action by him in the superior court, where the treasurer has no authority to collect an amount sued for, which accrued to the state insane asylum, and the amount alleged which accrued to the hospital is less than three hundred dollars. (Id.)

INSANE PERSONS (Continued).

5. **LIABILITY FOR NECESSARIES AT STATE HOSPITAL—ORDER FOR PAYMENTS BY GUARDIAN.**—An insane person is liable for the reasonable value of necessities furnished for his support at the state hospital, as required by the law of the state; and where his estate is sufficient for his support, an order may be made by the superior court requiring the guardian to make payments for his care and support at the state hospital. (*Estate of Yturburru*, 567.)
6. **CONSTITUTIONALITY OF STATUTE—GENERAL LAW—TAXATION—SUPPORT OF HOSPITAL.**—The law requiring that patients at the hospitals for the insane shall be there supported out of their own estates is wise and reasonable, and does not violate the constitution. The law is general, and is based upon a proper classification. It does not impose double taxation, or any taxation; and the money ordered paid goes to the support of the hospital, only because the patient is there supported. (*Id.*)
7. **INSANITY LAW—CONSTITUTIONAL LAW—NOTICE PRIOR TO COMMITMENT—DUE PROCESS OF LAW.**—The provisions of the act of March 31, 1897, known as the Insanity Law, so far as they purport to authorize the commitment to and retention in an asylum of a person alleged to be insane without giving him prior notice and an opportunity to be heard on the charge against him, lack the essential elements of due process of law, and are unconstitutional. (*Matter of Lambert*, 626.)
8. **ACTION UPON NOTE—INSANE DEFENDANT—SERVICE OF SUMMONS—APPEARANCE BY GUARDIAN—JURISDICTION—APPEAL.**—In an action upon a note, found to have been executed by the defendant when he was competent to contract, though he was found to have been afterwards committed to an insane asylum, where it appears that the service of summons was made both upon the defendant and upon his duly appointed guardian, and that the answer was entitled in the name of the defendant, in which the guardian answered "for said insane person and for himself," the court acquired jurisdiction of the person of the insane defendant, and the judgment against him, being supported by the pleadings and findings, will be affirmed upon appeal therefrom. (*Mullen v. Dunn*, 247.)

INSOLVENCY.

1. **ACTION BY ASSIGNEE—INSUFFICIENT DEFENSE—CONDITIONAL TENDER.**—In an action by the assignee of an insolvent debtor to recover personal property transferred to the defendant in violation of the insolvent law, an answer pleading a tender of possession of the property, coupled with the conditions that if the court shall finally determine that defendant was the owner, defendant would hold plaintiff responsible in damages, and that defendant did not by the tender waive his claim of ownership, presents no defense. (*Perkins v. Maier & Zobelein Brewery*, 372.)
2. **CONSTRUCTION OF INSOLVENT LAW—SURRENDER BY PREFERRED CREDITOR—CLAIMS TO DIVIDENDS.**—Section 50 of the Insolvent Law of

INSOLVENCY (Continued).

1895, relating to a surrender of the possession of property by a preferred creditor, refers only to the proof of claims against the estate, and the right of such creditor to dividends therefrom, and has no reference to the pleadings or defenses in an action. (Id.)

3. **OWNERSHIP BY INSOLVENT—CONDITIONAL SALE—CONFLICTING EVIDENCE—SUPPORT OF FINDING.**—A finding that the insolvent was the absolute owner of the property in controversy is sustained by evidence tending to prove the same, notwithstanding conflicting evidence of an oral bargain for a conditional sale of the property to him by the defendant, leaving the title thereto in the defendant while the purchase-money remained unpaid. (Id.)
4. **REMEDIES OF ASSIGNEE—REPLEVIN—DETINUE—TROVER.**—Under the provisions of the Insolvent Act of 1895, the assignee has the same choice of remedies as a private individual. He may sue for the property of the insolvent, or its value in case a delivery cannot be had, with damages for its detention, in an action of replevin or detinue, or may sue in trover to recover the value thereof only, in case of a wrongful conversion by the defendant. (Id.)
5. **ACTION BY ASSIGNEE—PREFERENCE OF CREDITOR—NOTICE OF INSOLVENCY—VERDICT AGAINST EVIDENCE.**—In an action by an assignee in insolvency to recover the value of goods of the insolvent attached and sold by a creditor, a verdict for the defendant is against the evidence, where it appears without conflict that the creditor either knew or had reasonable cause to believe that the debtor was insolvent within the meaning of the statute, and that the debtor also knew that fact, and that the purpose of both of the parties in procuring the attachment, judgment, and execution was to give a preference to such creditor, and prevent the property of the insolvent from being distributed ratably among his creditors. (*Levy v. Irvine*, 664.)
6. **MEANS OF KNOWLEDGE OF INSOLVENCY—CREDITOR PUT UPON INQUIRY.**—Where the creditor had full means of knowledge of the debtor's insolvency, and ample opportunity to discover the facts from the books of the debtor, placed in his hands, if he failed to investigate when thus put upon inquiry, he is chargeable with all the knowledge of the insolvency, which he would reasonably have acquired if he had performed his duty. (Id.)
7. **WILLFUL IGNORANCE EQUIVALENT TO KNOWLEDGE.**—A creditor cannot willfully shut his eyes to the means of information known to be at hand, and if he does so, his willing ignorance must be regarded as equivalent to actual knowledge. (Id.)

INSTRUCTIONS. See Criminal Law, 22, 24, 30, 32, 36, 43-46, 59, 60, 74-76; Damages, 1-3; Estates of Deceased Persons, 4; Negligence, 8, 12, 17, 18, 24, 32.

INSURANCE. See Appeal, 1, 2.

INTEREST. See Eminent Domain, 4; Mortgage, 3, 4; Reclamation District.

JUDGMENT.

1. **JUDGMENT BY DEFAULT—ORDER SETTING ASIDE—DISCRETION—APPEAL.**—The exercise of the discretion of the court in setting aside a judgment by default, for mistake, inadvertence, surprise, or excusable neglect of the defaulting party, under the authority conferred by section 473 of the Code of Civil Procedure, will not be disturbed upon appeal, unless an abuse of such discretion plainly appears. The discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy. (*Winchester v. Black*, 125.)
2. **RULE OF COURT—IMPROPER DEFAULT—RULING UPON DEMURRER—ABSENCE OF NOTICE.**—Under a rule of court providing for ten days after notice of an order overruling or sustaining a demurrer in which the adverse party may answer or amend, if the court did not refuse leave to the defendant to answer, or impose terms of answering in the absence of notice of an order dismissing a demurrer which the defendant failed to urge, the default of the defendant was improperly entered. (*Id.*)
3. **RIGHTS OF DEFENDANT UPON DEMURRER—EFFECT OF ORDER DISMISSING DEMURRER.**—A defendant who has interposed a demurrer to the complaint has the right to a direct decision of the issue of law thereby presented, whether he fails to urge it or not. The court is not authorized to strike out the demurrer, or to dismiss it for want of prosecution; and an order dismissing the demurrer on that ground has the same effect as an order overruling the demurrer, and is equivalent thereto, as respects the right of the defendant to notice thereof before default. (*Id.*)
4. **FORMER JUDGMENT—RES ADJUDICATA—DEMURRER—STATUTE OF LIMITATIONS—ACTION UPON ADDITIONAL PROMISE.**—A former judgment, rendered upon demurrer to a complaint, on the ground that the action appeared upon the face of the complaint to have been barred by the statute of limitations, is not a bar to a new action based upon an additional promise, preventing the bar of the statute. [*McFarland, J.*, dissenting.] (*Newhall v. Hatch*, 269.)
5. **JUDGMENT UPON DEMURRER, WHEN AND WHEN NOT A BAR.**—A judgment rendered upon the sustaining of a demurrer to a complaint will be a bar to another action for recovery upon the same facts; but if other facts are stated, which supply the defects of the first complaint, or which present a different cause of action, the judgment upon the demurrer will not be a bar to the second action. (*Id.*)
6. **ACTION UPON JUDGMENT—ACCRUAL OF CAUSE OF ACTION—FINALITY—STATUTE OF LIMITATIONS.**—A cause of action upon a judgment does not accrue until the judgment becomes final, and admissible in evidence. The statute of limitations does not begin to run against an action upon the judgment from the date of its entry, but only

JUDGMENT (Continued).

after the lapse of the period within which an appeal might be taken from the judgment, if none is taken therefrom, or after the final determination following an appeal so taken. (*Feeney v. Hinckley*, 467.)

7. **VACATION—ENTRY OF SECOND JUDGMENT—CORRECTION—PRESUMPTIONS—COLLATERAL ATTACK.**—The court has power to correct its records so that the judgment shall conform to its order; and where a judgment was set aside on the ground that it was entered by the clerk without direction therefor, and the court subsequently ordered the entry of a second judgment, such second judgment must be deemed the true and final judgment in the case; and the action of the court must be presumed correct and within its jurisdiction, in the absence of any showing in the record to the contrary. Its action cannot be impeached by any matter outside of the record, upon a collateral attack. (*Galvin v. Palmer*, 426.)
8. **NOTICE OF ORDER VACATING JUDGMENT—JURISDICTION—CONCLUSIVE PRESUMPTION.**—A party making a collateral attack upon a judgment or order must show by the record that the court did not have jurisdiction; and where the record is silent as to whether the plaintiff knew that the first judgment had been vacated, it will be conclusively presumed that they had notice thereof or consented thereto; and the fact that they did not in fact know that the first judgment had been vacated, and the second one entered, cannot relieve them from its conclusive effect. (*Id.*)
9. **CROSS-COMPLAINT—PROPRIETY OF PLEADING.**—The question whether a cross-complaint was a proper pleading or not in the former action could only be inquired into by a direct appeal from the judgment in favor of the cross-complaint therein, and cannot be considered upon a collateral attack in another action. (*Id.*)
10. **SETTING ASIDE JUDGMENT OF DISMISSAL—MISTAKE OF PLAINTIFF—SETTLEMENT OF ACTION—OVERSIGHT OF ASSIGNED CLAIM—APPEAL.**—A plaintiff who, by mistaken oversight of a small assigned claim, included in the complaint, but not in the prayer for judgment, settled the action for the amount of the principal claim and costs, and consented to a judgment of dismissal thereof, may, upon exercising diligence and taking proper steps after discovery of the mistake, be relieved against the judgment of dismissal, under section 473 of the Code of Civil Procedure; and an order granting such relief will not be disturbed upon appeal. (*Palace Hardware Co. v. Smith*, 381.)
11. **CONSTRUCTION OF CODE—CONSENT TO JUDGMENT—RELIEF AGAINST MISTAKE—MUTUALITY—JURISDICTION.**—Section 473 of the Code of Civil Procedure is remedial, and is to be liberally construed, so as to include a judgment in favor of as well as against the moving party, and to include a judgment of dismissal against the moving party, consented to by him to his injury, under a mistake of fact, which is excusable under the terms of the statute. The mistake relieved against need not be mutual; nor can the entry of the dismissal by the consent or order of the plaintiff under the mistake of

JUDGMENT (Continued).

fact on his part, whatever effect it may have as a retraxit in bar of another action, affect the jurisdiction of the court to grant relief against the mistake, by vacating the judgment under the code provision. (Id.)

12. **DISCRETION OF TRIAL COURT—APPEAL.**—Applications for relief under section 473 of the Code of Civil Procedure are addressed to the sound legal discretion of the trial court, and its action in granting or refusing such application will not be disturbed upon appeal, unless it clearly appears that the court has abused its discretion. (Id.)

13. **QUIETING TITLE—HOMESTEAD—SALE FOR ALIMONY—DEEDS—APPEAL BY DIVORCED HUSBAND—EVIDENCE.**—In an action brought by a divorced husband to quiet his title to a homestead declared upon community property which had been sold by the divorced wife under an execution for alimony, to which action the purchaser at the sale, and the grantees of the interest of the divorced wife in the homestead, were made defendants, although it appears that the divorced husband had appealed from the judgment of divorce, and from the order granting alimony, the judgment, order, execution deed to the purchaser, and deeds from the divorced wife, are admissible in evidence to show contingent rights in the defendants, which are entitled to be protected by the decree quieting the plaintiff's title. (Smith v. Smith, 117.)

14. **RULES AS TO JUDGMENT SUSPENDED BY APPEAL—ABATEMENT—CONTINUANCE—USE AS EVIDENCE.**—In order to secure the use, as evidence, of a judgment suspended by appeal, it may, in a proper case, be pleaded in abatement, until it becomes final, when it may be pleaded in bar by supplemental answer. A better mode to avoid an unjust conclusion, in general, is to move for a continuance until the suspended judgment can be used as evidence. But, without regard to these remedies, the rule that, pending an appeal, the judgment cannot be used as evidence to establish the right adjudicated, or to show an estoppel by judgment, does not operate to preclude its use as evidence to establish an indirect or contingent right in the defendants sued in an action to quiet title, to which right the decree for the plaintiff must be subject. (Id.)

See Appeal, 9, 17; Attorney at Law, 1-3; Divorce, 11; Ejectment, 1-3; Homestead, 3; Mechanic's Liens, 4; Pleadings, 1; Vendor and Vendee, 2, 8.

JURISDICTION. See Appeal, 17; Bond, 4; Conversion, 1; Counties, 9, 10; Criminal Law, 26; Estates of Deceased Persons, 17; Insane Persons, 8; Judgment, 8, 11; Summons.

JURY AND JURORS. See Criminal Law, 27, 35, 38, 46, 48-51, 62; Estates of Deceased Persons, 1; New Trial, 4-6.

LAND. See Public Lands.

LANDLORD AND TENANT.

1. **LEASE OF HOUSE NOT OCCUPIED BY TENANT—ACTION FOR RENT—ISSUE AS TO CONTRACT OF HIRING—CONFLICTING EVIDENCE—SUPPORT OF FINDINGS.**—In an action for rent upon a lease of a house for six months, where the defendant did not occupy the house leased, and the only issue presented by the pleadings was, whether the defendant had hired the premises leased, and the evidence was highly conflicting upon that issue, the findings in favor of the plaintiff will not be disturbed upon appeal. [Held, *contra*, by Beatty, C. J., and Temple, J., dissenting, that upon certain undisputed facts testified to, the plaintiff was not entitled to recover.] (Fitzhugh v. Baird, 570.)
2. **POSSESSION BY LESSOR—RECoupMENT NOT PLEADED—EVIDENCE.**—Where the defendant pleaded no recoupment on account of the lessor's possession of the leased premises, and did not offer evidence to show that the possession was of any value to the lessor, and the lessor testified to the effect that the occupancy taken was to protect the house and its contents from injury in case it should remain vacant, such possession cannot affect the liability of the lessee for the rent. (Id.)
3. **ADVICE OF PHYSICIAN TO LESSEE—CROSS-EXAMINATION—PRIVILEGE.**—Upon proper cross-examination of the defendant lessee, the advice of a physician, as to moving into the house may be proved, if not shown to be in any respect privileged. (Id.)

See Contempt; Damages; Ejectment, 3-5; Estates of Deceased Persons, 9, 10; Statute of Frauds, 2.

LARCENY. See Criminal Law, 26, 73-76.

LICENSE.

1. **LICENSE TAX—POWER OF SUPERVISORS IN MUNICIPALITIES REPEALED.**—Under the act of 1901 (Stats. 1901, p. 635), adding section 3366 to the Political Code, the power of county supervisors to license business for revenue purposes within the limits of municipalities is repealed by necessary implication; and they are forbidden to impose any license tax, either for purposes of revenue or regulation, within such limits. (Ex parte Pfirrmann, 143.)
2. **CONSTITUTIONAL LAW—TITLE OF ACT—DUPLICITY—SINGLE SUBJECT-MATTER.**—The title of the act of 1901 entitled "An act to add a new section to the Political Code of the state of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees, in their respective counties, cities, and towns, to impose a license tax," is in furtherance of section 11 of article XI of the constitution, and there is no duplicity in the subject-matter. It contains a single subject-matter, relating to the issuance of licenses, for regulative purposes, by counties, cities, and towns. (Id.)
3. **CONSTRUCTION IN RELATION TO TITLE—"LICENSE TAX"—PRESUMPTION OF VALIDITY.**—The act of 1901 is to be presumed valid, and so construed, if possible. The words "license tax," in the title,

LICENSE (Continued).

will not be construed to mean "license taxes for revenue," which are thereby repealed, but are to be construed as synonymous with "license fee or charge," as a police regulation. (Id.)

4. CONSTRUCTION OF CONSTITUTION—POWER OF LEGISLATURE.—Section 12 of article XI of the constitution, forbidding power to the legislature to impose taxes for county, city, town, or other municipal purposes, but authorizing it by general laws to vest power in the corporate authorities to assess and collect taxes for such purposes, does not prohibit the legislature from forbidding them to collect a license tax for revenue. (Id.)
5. EFFECT OF SPECIAL INCONSISTENT ACT OF SAME DATE.—The special act of the same date with the act establishing section 3366 of the Political Code, applicable only to municipal corporations of the fifth class, and inconsistently providing for power of such corporations to license for purposes both "of regulation and revenue," if it be considered as passed subsequently, could only operate to repeal that section *pro tanto*; and if considered as an unconstitutional special law, it will not be construed to render void the general law by being incorporated therein, and read as part thereof. (Id.)

LIEN.

LIEN UPON PROCEEDS OF MINE—ADVANCES BY PART OWNER—CONTRACT EXCLUDING PERSONAL LIABILITY—ABSENCE OF BREACH—FORECLOSURE.—Under a contract which gave the management of a mine to one part owner, and a right to reimbursement for all advances from the proceeds of the working of the mine, but which expressly excluded any personal liability of the other part owners for any part of such advances, and did not guarantee any sufficiency of proceeds, so long as the contract is not broken by the other part owners, no lien arises for advances against their interests which can be enforced otherwise than by working the mine, and no action will lie under the contract for the foreclosure of a lien upon and sale of their interests. (*Frowenfeld v. Hastings*, 129.)

See Contract, 1, 2; Mechanic's Liens.

LIMITATIONS. See Statute of Limitations.

LOTTERY TICKETS. See Municipal Corporations.

MANDAMUS.

DEFAULT OF DEFENDANT—DENIAL OF WRIT—APPEAL—ERROR NOT APPEARING.—In a *mandamus* proceeding, the allegations of the petition are not taken as true because of the default of the defendant, but the court must hear the cause notwithstanding, and where, upon such hearing, the writ was denied, the judgment of the court must be affirmed upon appeal of the defendant, if it is not shown by the record that the court erred in refusing the writ, and that such

MANDAMUS (Continued).

a case was made before it as required its issuance. (Jackson School District of Amador County v. Culbert, 508.)

See Bill of Exceptions; Counties, 7-10; New Trial, 1; Taxation, 7, 8.

MARRIED WOMEN. See Community Property, 2.

MASTER AND SERVANT. See Negligence, 1-3, 7-9.

MEASURE OF DAMAGES. See Damages.

MECHANIC'S LIENS.

1. **ESTATE OF DECEASED PERSON—POWER OF EXECUTOR—INVALID CLAIM OF LIEN—AGREEMENT OF HEIRS AND PURCHASER.**—An executor has no power, without an order of court, to make a contract which would give a right to file liens upon the property of the estate; and an invalid claim of lien, based on a contract made with the executor alone, without such order, cannot be made valid by consent or agreement of the heirs to pay for the work, or by an agreement that a purchaser of the estate should assume the debt and pay for the work. (San Francisco Paving Co. v. Fairfield, 220.)
2. **STATUTORY LIEN—ASSUMPTION OF DEBT—EQUITABLE LIEN—PERSONAL LIABILITY.**—A mechanic's lien is purely statutory, and can only be acquired by compliance with the statute. The assumption of the debt for the work does not create an equitable lien, in the absence of an agreement therefor, but only creates a personal liability. (Id.)
3. **CAUSES OF ACTION NOT SEPARATELY STATED—REMEDY BY MOTION.**—The objection that causes of action are not separately stated is to be made by motion, and not by demurrer. (Id.)
4. **IMPROPER SUSTAINING OF DEMURRER—RIGHT TO PERSONAL JUDGMENT—PARTIES.**—Where the complaint in an action to foreclose a mechanic's lien shows an invalid claim of lien, but also shows a right to a personal judgment against a purchaser of the property and her husband, who, in consideration of the purchase, had agreed and promised to assume and pay the amount of the claim, and who were proper and necessary parties to the foreclosure suit, it is error to sustain a demurrer to the entire complaint. Although the foreclosure may be denied, the personal action may proceed against those parties. (Id.)

MINES AND MINING.

1. **MINING CLAIM—OPTION TO PURCHASE—EXPENSE OF PROSPECTING—CONSIDERATION OF OPTION—REASONABLE REQUIREMENT.**—Where an option is given to purchase a mining claim, an agreement that the proposed purchaser shall expend money in prospecting the mine by the sinking of a shaft, to enable him to exercise his option, is a

MINES AND MINING (Continued).

pledge of good faith, and is a reasonable requirement; and the expenditure made in exploiting the mine is in consideration of the option. (*Benson v. Braun*, 41.)

2. **OPTION NOT EXERCISED—FAILURE OF TITLE—REFUSAL OF DEED—EXPENSE NOT RECOVERABLE—VALUE NOT ENHANCED.**—Where the proposed purchaser does not appear to have exercised his option by tender of the purchase-money or otherwise, he cannot, merely because he refused the tender of a deed by the vendor for failure of title to one half of the mine, recover from the vendor the money expended in sinking the shaft, which is not shown to have discovered that the mine was of any value, and which is found not at all to have enhanced its value. (*Id.*)
3. **MINERAL LANDS—PLACER CLAIM—CERTIFICATE OF PURCHASE—UNAUTHORIZED RESERVATION IN PATENT—KNOWN LODES.**—A certificate of purchase of a placer-mining claim, issued under the Placer Act of July 9, 1870, prior to the passage of the General Mining Act of May 10, 1872, conferred upon the purchaser an equitable title, and vested right to a patent, which was not subject to section 11 of the latter act; and a reservation, made in a patent for such claim, issued after May 10, 1872, of all known lodes within the limits of the placer claim, was unauthorized and void. (*Cranes Gulch Mining Co. v. Scherrer*, 350.)
4. **TITLE TO MINERALS—SUBSEQUENT LOCATION OF LODE CLAIM.**—In the absence of a prior location of a known lode within the limits of the placer claim, and a contest thereupon in the land-office, the patent granted under the certificate of purchase issued prior to the act of 1872 conferred upon the purchaser the title to all minerals within such limits; and a subsequent location, made by another person, of a lode previously known to exist therein, is invalid and void. (*Id.*)
5. **MINE UPON HOMESTEAD—IMPROVEMENTS UNDER ORAL CONTRACT—REFUSAL TO SIGN AGREED WRITING—RECOVERY OF IMPROVEMENTS—FINDINGS—CONFLICTING EVIDENCE.**—Mining machinery and other improvements erected by the plaintiffs upon a mine situated upon the homestead of the defendants, under an oral contract therefor, and for possession and an interest in the mine, which it was agreed should be written and executed by the parties, but which, when drafted by the plaintiffs, and orally assented to as correct by the defendants, who agreed to sign it, they finally refused to sign, and thereupon ousted the plaintiffs, after the improvements were completed as agreed, may be recovered by the plaintiffs, under findings, upon substantially conflicting evidence of such facts alleged in the complaint, which showed that the plaintiffs, as tenants at will under the oral contract, were entitled to remove the improvements, and to have possession for that purpose, and that the improvements were not so constructed as to be an integral part of the mine, and could be removed without injury to the realty. (*Goodwin v. Perkins*, 564.)

MINES AND MINING (Continued).

6. **RECOVERY OF IMPROVEMENTS AS PERSONAL PROPERTY—POSSESSION—TENANCY AT WILL.**—The machinery and other improvements, under the facts of the case, may be recovered as personal property, upon demand therefor, and refusal to deliver the same without temporary possession of the premises, and without reference to any tenancy at will upon the homestead premises, which could be created only as provided by law, by a properly acknowledged instrument. [Per Temple, J., specially concurring.] (Id.)
7. **MINING CLAIMS—WATER RIGHTS—DITCH—PRIOR APPROPRIATION—INJUNCTION—FINDINGS AGAINST EVIDENCE.**—In an action by the owner of a mining claim to enjoin interference with the plaintiff's ditch, which conveyed water for mining purposes across defendant's claim, findings in favor of the defendant, under his cross-complaint seeking an injunction against the plaintiff, to the effect that he had made a prior location of the water right and of his quartz mine, are against evidence which shows the initiation of a prior right to the water and ditch in the plaintiff, and does not show any notice of appropriation of the water by the defendant, but shows that the defendant's first use of the water was subsequent in point of time to plaintiff's appropriation thereof, and does not show that the defendant had discovered any minerals within his quartz location until after plaintiff's right to maintain his ditch had attached. (Tuolumne Consolidated Mining Co. v. Maier, 583.)
8. **LOCATION OF MINING CLAIM—DISCOVERY OF MINERAL.**—There can be no valid location of a mining claim without an actual discovery of mineral thereon; and conceding that a previous location without such discovery may become valid by a subsequent discovery of mineral, the land must be treated as government land up to the time of such discovery. A location based upon a discovery within the limits of another existing and valid location is void. (Id.)

MINORS. See Guardian and Ward.

MISTAKE. See Estates of Deceased Persons, 7; False Imprisonment; Fraudulent Conveyance, 11; Judgment, 10, 11; Taxation, 7, 8.

MORTGAGE.

1. **FORECLOSURE OF MORTGAGE—SALE OF REAL PROPERTY PURSUANT TO DECREE—WRIT OF ASSISTANCE.**—Where a sale of real property has been regularly made pursuant to the decree in an action foreclosing a mortgage thereupon, it should not be set aside; and a writ of assistance is properly issued to place the purchaser at the foreclosure sale in possession of the mortgaged premises after the time for redemption has expired. (Taylor v. Ellenberger, 31.)
2. **REAL AND PERSONAL PROPERTY MORTGAGES—SEPARATE SALES—MODIFIED JUDGMENT—EXCESSIVE INTEREST.**—Where this court directed that the amounts due on real and personal property mort-

MORTGAGE (Continued).

gages, included in the same action, be separately adjudicated, and separate sales ordered, for a proper application of the proceeds, in modifying the judgment under such direction it was excessive to compute conventional interest to the date of the modified decree. The proper apportionment should be of the amounts separately found due on the different mortgages at the date of the original decree, with legal interest from that date to the dates of the respective sales, and such amounts are to be credited as of the dates of the sales, with the net proceeds thereof, to ascertain the proper deficiencies. (Id.)

3. **COTEMPORANEOUS INSTRUMENT—VOID CONTRACT—PAYMENT OF MORTGAGE TAX—FORFEITURE OF INTEREST.**—Where a note and mortgage bore interest at one per cent per month, a cotemporaneous instrument, signed by the mortgagee, agreeing to exact no more interest than eight per cent per annum, and to refund all interest paid over eight per cent, after he had paid the mortgage tax out of said one per cent per month, is to be construed as one with the note and mortgage, and as constituting an agreement that the mortgagors would pay the mortgage tax, not exceeding four per cent upon the amount of the note, in addition to the exacted interest of eight per cent. Such contract is void, under section 4 of article XIII of the constitution, and forfeits all unpaid interest upon the note and mortgage. (Matthews v. Ormerd, 84.)
4. **PAYMENT OF TAXES BY MORTGAGORS—CREDIT UPON MORTGAGE.**—Where the taxes upon the mortgage were in fact paid by the mortgagors out of their own money, and the mortgagee simply remitted the four per cent of interest-money to the mortgagors, the mortgagors are entitled to be credited upon the mortgage with the amount of taxes paid by them; and the mortgagee is not entitled to recover the unpaid interest. (Id.)
5. **FORECLOSURE—TIME FOR REDEMPTION—CONSTITUTIONAL LAW.**—The time for redemption from a sale under the foreclosure of a mortgage is that fixed by the statute in force at the date of the mortgage; and an extension of the time for such redemption, by a subsequent statute, cannot constitutionally apply to a sale under a mortgage executed prior to its passage. (Malone v. Roy, 344.)
6. **DEED AND DEFEASANCE.**—A warranty deed executed cotemporaneously with a separate defeasance agreeing to reconvey the property deeded upon the payment of certain indebtedness therein described, constitutes a mortgage, which is within the rule determining the time for redemption from a sale under foreclosure thereof. (Id.)
7. **PRIOR UNRECORDED DEED TO ATTORNEY IN FACT—REPRESENTATION AS TO TITLE—ESTOPPEL.**—One who executed a mortgage as attorney in fact for his grantor, from whom he held an unrecorded deed, and who represented to the mortgagee, who advanced money upon the faith of the mortgage, that his principal was the owner of the land mortgaged, is estopped from setting up title in himself, except

MORTGAGE (Continued).

in subordination to the mortgage; and the estoppel is equally binding upon his wife, who succeeded to his interest, as distributee of his estate. (*Filipini v. Trobock*, 441.)

8. **RECORD OF DEED BY WIDOW—DISTRIBUTION OF ESTATE—FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS.**—Where the widow of the deceased attorney in fact found the unrecorded deed among his papers, and recorded it, and subsequently received sole distribution of the land, the effect of the record of the deed and of the distribution to her is the same as if the deed had been executed to his estate when it was recorded; and her estoppel to deny that the mortgagee was the owner of the land at the date of the mortgage does not extend to the depriving her of the right, as a subsequent grantee, to plead the statute of limitations in an action to foreclose the mortgage. [*McFarland, J.*, dissenting.] (*Id.*)
9. **PARTIES TO FORECLOSURE—RUNNING OF STATUTE—ABSENCE OF MORTGAGOR.**—Where the deed to the deceased husband was recorded before the maturity of the note, such record made the widow, who was his sole devisee of the land mortgaged, a proper and necessary party to an action to foreclose the mortgage; and where more than four years elapsed after maturity of the note, and after distribution of the land to the widow, the action to foreclose the mortgage is barred as to her, notwithstanding the absence of the mortgagor from the state continuously after the maturity of the note. (*Id.*)
10. **ACCOUNTING OF MORTGAGEE IN POSSESSION—RENTS AND PROFITS—SECURITY FOR FUTURE ADVANCES.**—A mortgagee in possession is chargeable, upon an accounting with the mortgagor, for the rents and profits arising from the land mortgaged; and where the possession of the mortgagee was taken under a deed, and cotemporaneous agreement expressly providing for the repayment of future advances with interest, it is immaterial that there was no actual indebtedness at the date of the mortgage. (*Moss v. Odell*, 464.)
11. **MONEYS AND CHOSSES IN ACTION TURNED OVER TO MORTGAGEE—NOTE OF MORTGAGEE TO MORTGAGOR—PAYMENT—DECREE FOR ACCOUNTING.** Where it appears that the plaintiff, at the time of the mortgage, turned over notes, moneys, and choses in action to the mortgagee, who was the sister of the mortgagor, in whom he had great confidence, such notes, moneys, and choses in action were properly included in the decree for the accounting; and the defendant cannot complain that one of the notes so included was a note given by the mortgagee to the mortgagor, and that it should not be included because possession thereof was *prima facie* evidence of payment. The mortgagee, upon the accounting, may show his right to the note; and it will be time enough to complain when the mortgagee is finally adjudged responsible to the mortgagor for the amount of such note. (*Id.*)
12. **MORTGAGE BY DEED—STATUTE OF LIMITATIONS—RENEWAL OF NOTE SECURED—EFFECT AS TO THIRD PARTIES.**—The renewal of a note

MORTGAGE (Continued).

secured by a deed intended as a mortgage, before the statute of limitations had run against the original note, had the effect to continue the original liability for the term named in the new note, and the effect of such renewal, with reference to third parties dealing with the land as that of the mortgagor, is the same as if the mortgagor had then executed a mortgage for the amount of the renewed note, and it could not be impaired by any subsequent acts of third parties. (*Newhall v. Hatch*, 269.)

13. **LIEN OF JUDGMENT CREDITOR SUBORDINATE TO MORTGAGE—EXECUTION SALE—NOTICE TO PURCHASER—FACTS PUTTING UPON INQUIRY.**—The lien of a creditor of the mortgagor, whose judgment was rendered against the mortgagor subsequent to the date of the renewal of the mortgagor's note, was subordinate to the lien of the mortgage; and where such creditor subsequently became purchaser at an execution sale under the judgment, after notice of the original terms of the mortgage by deed, he is chargeable with notice of all the facts which he might have obtained by inquiry relative to the renewal by the mortgagor of the original note prior to his judgment. (*Id.*)
14. **DIVORCE SUIT—RECEIVER—MORTGAGE PERMITTED BY COURT—SUBJECTION OF PLAINTIFF'S RIGHTS.**—The plaintiff in a divorce suit, in which a receiver was appointed, cannot question the validity of a mortgage permitted to be made by the defendant under an order of the court, which was affirmed upon appeal; and any title acquired by her under a receiver's sale must be subject to such mortgage. (*White v. Costigan*, 33.)
15. **FORECLOSURE OF MORTGAGE—PARTIES—RECEIVER—PURCHASE PENDING SUIT—RIGHT OF REDEMPTION.**—Upon the foreclosure of the mortgage permitted by the court, the plaintiff in the divorce suit, not having acquired an interest in the mortgaged premises, was not a proper or necessary party. But where the receiver appeared by leave of the court, and set up the rights of the plaintiff, with her full knowledge, any interest acquired by her at a receiver's sale, made pending the suit, was subject to the decree of foreclosure, and could give her no more than a statutory right of redemption from the sale under the decree, as successor in interest of the mortgagor. (*Id.*)
16. **TITLE LOST BY FAILURE TO REDEEM—ACTION TO QUIET TITLE.**—Where no redemption was made or attempted from the sale under the decree of foreclosure by the purchaser at the receiver's sale, and title passed under such foreclosure sale to another person, any title acquired under the receiver's sale was thereby lost, and could not be successfully asserted in an action to quiet title against the holder of the sheriff's deed under the decree of foreclosure. [*McFarland, J., dissenting.*] (*Id.*)
17. **REDEMPTION BY MORTGAGEE OF OTHER LANDS—MONEY RETAINED BY PURCHASER—ESTOPPEL—SHERIFF'S DEED—ASSIGNMENT.**—Where no redemption from the sale under foreclosure of the mortgage was

MORTGAGE (Continued).

made or attempted by the purchaser at the receiver's sale, but the payment of redemption-money was made by the holder of a judgment for deficiency under the foreclosure of a mortgage of other lands, which was accepted and retained by the purchaser under the foreclosure sale, and a certificate of redemption was thereupon issued to him, the purchaser was estopped from questioning his right to redeem, and the sheriff's deed passed title to him, with like effect as if the certificate of sale had been assigned to him when the money was received. (Id.)

18. **SUBSEQUENT QUITCLAIM DEED BY PURCHASER—INTEREST PREVIOUSLY TRANSFERRED.**—A subsequent quitclaim deed executed by the purchaser at the sale under the decree of foreclosure, after reception and retention of the redemption-money by him, can have no greater effect than a second assignment of the certificate of purchase, after all of his rights thereunder had passed to the one from whom he received the redemption-money, and such quitclaim deed could confer no right. (Id.)

See Attorney at Law; Corporation, 8-10; Fraudulent Conveyance, 8; Pledge; Statute of Limitations; Summons.

MUNICIPAL CORPORATIONS.

POSSESSION OF LOTTERY TICKETS—CONSTITUTIONAL LAW.—Under section 11 of article XI of the state constitution, a municipal corporation, in the exercise of its police powers, has authority, by ordinance, to make it unlawful for any person to have in his possession a lottery ticket, and to punish its violation. Such an ordinance is neither unreasonable nor oppressive. (Ex parte McClain, 110.)

See Corporations; License; Police-officers.

MURDER AND MANSLAUGHTER. See Criminal Law, 27-61.

NEGLIGENCE.

1. **MASTER AND SERVANT—DUTY OF EMPLOYER—SUITABLE APPLIANCES—WARNING TO INEXPERIENCED EMPLOYEE.**—It is the personal duty of an employer to furnish his employee with suitable appliances, and to warn an inexperienced employee, who is put at dangerous work, requiring the exercise of skill, of the dangers attending such work, of which the employer is aware, and the employee is ignorant. (Tedford v. Los Angeles Electric Co., 76.)
2. **DELEGATION TO SUPERIOR FELLOW-SERVANT—VICE-PRINCIPAL.**—The employer cannot escape responsibility for neglect of any of the duties personally imposed upon him, by delegating them to a superior fellow-servant. The fellow-servant, in such case, becomes a vice-principal, who represents the employer. (Id.)
3. **INJURY FROM LIVE ELECTRIC WIRE—INEXPERIENCED LINEMAN—NEGLECT OF SUPERIOR FELLOW-SERVANT.**—An electric company is responsible for injury from a live electric wire to an inexperienced

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- servant, who had never performed the work of a "lineman," which required great skill, and to which he was assigned by a superior fellow-servant, and required to ascend a pole and scrape the wire, without being furnished with rubber gloves, or other protective appliances used by linemen, and without any instruction or warning as to the dangers attending the work, of which he was ignorant. (Id.)
4. **EXCESSIVE VERDICT.**—Where it cannot be said, as matter of law, that the verdict for damages awarded by the jury is excessive, it cannot be disturbed upon appeal, although it appears large, and it may seem that a smaller amount would be more just. (Id.)
5. **LAW OF THE ROAD—COLLISION OF HACK WITH BICYCLE—LIABILITY OF EMPLOYER.**—It is the duty of the driver of a hack, which has been traveling upon a street-car line, upon meeting a street-car, to turn to the right, if possible, so as to avoid collision with other travelers, going in the opposite direction; and where he negligently turned to the left, and collided with a bicycle-rider, who was riding on the proper side of the street, the employer of the hack-driver is liable for the resulting injury to the bicycle-rider. (*Diehl v. Roberts*, 164.)
6. **EMPLOYMENT OF HACK-DRIVER—SUFFICIENCY OF EVIDENCE.**—Evidence showing that the hack was owned by the defendant, that he received the profits earned by it, and that the driver lived at his house, and worked for him in other capacities, taken in connection with evidence of admissions made by the defendant, is sufficient to show the employment of the hack-driver by the defendant. (Id.)
7. **MASTER AND SERVANT—DEFECTIVE MACHINE—PLEADING—DISCHARGE OF SERVANT'S DUTY.**—In an action by an employee to recover damages from his employer for injuries suffered by him in the course of his employment, by reason of a defective machine, the omission to allege in the complaint that "the plaintiff was injured while in the necessary and proper discharge of his duty," does not vitiate the cause of action, nor render the complaint objectionable in that regard, in the absence of a special demurrer. (*McFaul v. Madera Flume and Trading Co.*, 313.)
8. **INHERENT DEFECT IN MACHINERY—INSTRUCTIONS—CONSTRUCTION.**—An instruction directing the minds of the jury to an inherent defect in the machinery, which the defendant might have discovered by reasonable diligence, and of which the plaintiff was ignorant, and could not discover in the ordinary course of his employment, and predicated recovery thereon, is not misleading, because not comprising every element of recovery, where all of the elements essential to a recovery by the plaintiff were fully set forth in other portions of the charge, which must be construed together with such instruction. (Id.)
9. **EXPERT EVIDENCE—RELATIVE STRENGTH OF WROUGHT AND CAST IRON.**—A qualified expert may testify as to the relative strength of wrought and cast iron, as material for the part of the machine in

NEGLIGENCE (Continued).

- question, the evidence being pertinent and material to the issue. (Id.)
10. **COLLISION OF ELECTRIC CAR WITH WAGON—QUESTIONS FOR JURY—NONSUIT—SUPPORT OF VERDICT.**—In an action for injuries, caused by the negligence of the defendant in causing an electric car to collide with plaintiff's wagon at a regular crossing, where the evidence was conflicting, and that adduced on the part of the plaintiff tended to show that the car was running at an excessive rate of speed, and that the plaintiff was driving slowly and using due care, the questions whether, upon the whole evidence, the collision was inevitable, or defendant was guilty of negligence, and whether the plaintiff was chargeable with contributory negligence, were properly submitted to the jury. A motion of the defendant for a nonsuit in such case was properly denied; and a verdict for the plaintiff will not be disturbed upon appeal. (*Cook v. Los Angeles and Pasadena Electric Ry. Co.*, 279.)
 11. **EVIDENCE—SPEED OF CAR—DISTANCE—SCHEDULE TIME—CROSS-EXAMINATION.**—Where some of defendant's witnesses testified to the rate of speed of the car, questions asked them, on cross-examination, as to the distance between the termini, and the schedule time for that run, were within the range of proper cross-examination, and being preliminary, could not be prejudicial to the defendant. (Id.)
 12. **REQUESTED INSTRUCTIONS SUBSTANTIALLY INCLUDED IN CHARGE.**—The refusal of the court to give requested instructions, substantially included in the charge, which as a whole, stated the law correctly, is not erroneous, and the fact that the precise language of the requests was not given, and that some of them were modified, cannot prejudice the rights of the appellant. (Id.)
 13. **ACTION FOR PERSONAL INJURIES—DEFECTIVE BOLT AND NUT IN HARVESTER—EXPERT EVIDENCE.**—In an action for personal injuries, caused by reason of the separation of a defective bolt and nut used to connect the header and separator in a side-hill combined harvester, manufactured for and sold to the plaintiff by the defendant, the question whether the bolt and nut were proper and sufficient for the coupling together of the parts of the harvester is peculiarly one for the evidence of a qualified expert, experienced in the construction of such machinery for the purpose intended. (*Snyder v. Holt Manufacturing Co.*, 324.)
 14. **WRITTEN CONTRACT OF SALE—EVIDENCE—CIRCUMSTANCES ATTENDING SALE—INTENTION OF PARTIES.**—The written contract of sale of the harvester may be explained by reference to the circumstances under which it was made, and the matter to which it relates; and evidence of the circumstances attending the sale is admissible to aid the court in arriving at the intention of the parties in the purchase and sale of a harvester manufactured by the vendor, of a peculiar build, and intended for a particular purpose. (Id.)

NEGLIGENCE (Continued).

15. **WARRANTY OF HARVESTER—CODE PROVISIONS PART OF CONTRACT.**—Where the contract expressly warranted the machines "to be made of good material and durable with proper care," and the circumstances proved showed that the machine was manufactured and sold by the vendor for a particular purpose, the provisions of section 1769 of the Civil Code, warranting the sale of an article of the seller's manufacture "to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture," and of section 1770 of the same code, that "one who manufactures an article for a particular purpose, warrants by the sale that it is reasonably fit for that purpose" are applicable, and enter into and form part of the contract of sale. (Id.)
16. **QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE—PATENT DEFECT.** The questions whether the defendant was guilty of negligence in the construction and manufacture of the machine, and whether the defect was sufficiently patent to charge the plaintiff with contributory negligence, were questions of fact for the jury to determine, and not questions of law for the court, where different conclusions upon those questions might be rationally drawn from the evidence. (Id.)
17. **PERSONAL INJURIES—ELEMENTS OF COMPENSATION—DAMAGES—INSTRUCTION.**—In an action to recover damages for personal injuries, caused by the negligence of the defendant, it was proper to instruct the jury that the measure of recovery was compensatory damages, the elements of which were expenses paid by plaintiff for care and nursing while disabled, and the value of the time lost while disabled, to be determined from direct evidence before the jury, and such reasonable compensation for impairment of his earning power, and for his pain and anxiety, as the jury might, in their sound discretion, determine, not exceeding, in all, the amount alleged. (*Storrs v. Los Angeles Traction Co.*, 91.)
18. **COMPENSATION FOR INABILITY TO ATTEND TO BUSINESS—REFUSAL OF INSTRUCTION.**—An instruction requested, to the effect that the jury could not award any damages for loss which the plaintiff might have suffered because of inability to attend to his business after the accident, was properly refused. (Id.)
19. **EARNINGS NOT PROVED—EARNING CAPACITY—DISCRETION OF JURY.**—Where the evidence showed that the plaintiff was accustomed to attend to his own business, the general nature of which appeared, and that as the result of the injury his capacity for attending to his business was seriously impaired, the fact that there was no proof of earnings, or of any specific amount that he was capable of earning, cannot deprive him of the right to compensation for his earning capacity, of which the jury may judge, and, in the exercise of a wise discretion, fix the amount of damages to be recovered therefor; and their verdict thereupon will not be disturbed, if it does not appear to be excessive. (Id.)

NEGLIGENCE (Continued).

20. **EVIDENCE—MATTERS OF COMMON KNOWLEDGE.**—No testimony is required upon matters which are presumably within the knowledge or observation of all men of common intelligence. (Id.)
21. **INJURY IN ELEVATOR-SHAFT—GUIDANCE BY SERVANT—ABSENCE OF WARNING.**—Where the plaintiff, being a stranger to defendant's warehouse, was sent there to sample goods, he was justified in trusting himself to the guidance of defendant's porter, and where such porter led him through a dark passage to a poorly lighted and unguarded elevator-shaft, into which he fell, under circumstances which warranted the jury in finding that the negligence of the porter in failing to warn the plaintiff, and not the contributory negligence of the plaintiff, was the proximate cause of the injury, a verdict against the defendant, who was the employer of the porter, is sufficiently sustained. (*Sheyer v. Lowell*, 357.)
22. **CONTRIBUTORY NEGLIGENCE—ESTOPPEL OF DEFENDANT.**—The defendant cannot be heard to urge that the plaintiff, having been led by defendant's servant to such unprotected elevator-shaft, without warning of danger, walked into the shaft as the result of his own negligence. (Id.)
23. **DUTY TO PROTECT SHAFT—CONSTRUCTION OF CITY ORDINANCE—EVIDENCE.**—A city ordinance providing that "every opening in a shaft or hoist-well within two and a half feet above the floor shall be protected by a rail, gate, door, or drop-door," is not invalid as being class legislation, but applies for the protection of all classes of people, and to every opening in a shaft or hoist-well in houses erected before as well as after its passage. Such ordinance was admissible in evidence to show the duty of the defendant to protect the shaft in which the plaintiff was injured. (Id.)
24. **TWO THEORIES OF NEGLIGENCE—REFUSAL OF REQUESTED INSTRUCTIONS.**—Where the evidence tended to support two theories of negligence, one being the absence of any guard to the well, and the other the porter's act in leading plaintiff to the well and permitting him to fall into it, requested instructions for the defendant, based upon one of these theories alone, and ignoring the other, were properly refused. (Id.)
25. **ACTION FOR DEATH—COLLISION OF STREET-CAR WITH FOOTMAN—SPECIFICATIONS IN STATEMENT.**—In an action for death, caused by the alleged collision of a street-car with a footman at the intersection of two streets, a specification, in the statement of insufficiency of evidence, tending to show that the deceased "was struck by the car while making an attempt to pass over East Street, at a public crossing," the connection of which shows that it may be construed as specifying merely that there was no public crossing where the accident occurred, does not support the contention that the defendant was killed by slipping and falling upon the pavement without actual contact with the car, and that the evidence was insufficient to warrant the jury in finding that the deceased was in fact struck by the car. (*Schneider v. Market Street Ry. Co.*, 482.)

NEGLIGENCE (Continued).

26. **NEGLIGENCE OF STREET-RAILWAY COMPANY—EXCESSIVE SPEED—ABSENCE OF WARNING REQUIRED BY ORDINANCE.**—Where there was evidence from which the jury might infer that the street-car was crossing the intersection of its line with another street, at an excessive rate of speed, when it collided with the deceased, and where it affirmatively appears as an established fact that no bell was rung or gong sounded as the car approached the limit of twenty-five feet from the intersecting street, as required by a city ordinance set out in the complaint, the negligence of the street-railway company is sufficiently established to support the verdict for the plaintiff. (Id.)
27. **CONSTRUCTION OF ORDINANCE—WARNING AT “STREET CROSSING”—PROTECTION OF FOOT-PASSENGERS—STREETS TERMINATING AT INTERSECTION.**—A city ordinance requiring a warning to be given by a street-car when approaching a “street crossing,” is designed for the protection of foot-passengers, and the reason of the rule applies equally to all intersecting streets across which streams of foot-passengers pass. Such ordinance is to be construed as applying to all intersecting streets, including those which terminate at the point of intersection with the street upon which the cars pass. (Id.)
28. **CONTRIBUTORY NEGLIGENCE OF PLAINTIFF—BURDEN OF PROOF—QUESTION FOR JURY.**—The burden of proof is upon the defendant to establish the contributory negligence of the plaintiff; and such contributory negligence is a question of fact for the jury, whose verdict thereon is conclusive, where the existence of such contributory negligence, and that it contributed proximately to the injury, does not appear to follow necessarily and irresistibly from the undisputed facts, so as to justify the court in disturbing the verdict as matter of law. (Id.)
29. **CROSSING TRACK IN FRONT OF STREET-CAR—ORDINARY PRUDENCE.**—Ordinary prudence is required on the part of all persons crossing the track in front of a moving car; but the question what is ordinary prudence is widely different in a case where the crossing is in front of a street-car, from that where it is in front of an ordinary steam-railroad. Held, upon the facts of this case, that it cannot be said, as matter of law, that the action of the deceased in crossing the street in front of the street-car was the proximate cause of the injury, or that it necessarily constituted negligence on his part. (Id.)
30. **PLAINTIFF SUDDENLY PUT IN PERIL—UNWISE CHOICE.**—Where the plaintiff was suddenly put in peril by the negligence of the defendant, without having sufficient time to consider all the circumstances, he is excusable for omitting some precaution or making an unwise choice under this disturbing influence, and even if, in his bewilderment, he runs into the danger he fears, he is not at fault. (Id.)
31. **EVIDENCE—CONTACT OF CAR WITH DECEASED—IMPEACHMENT OF WITNESS—QUESTION FOR JURY.**—Where the motorman testified

NEGLIGENCE (Continued).

that he could not tell whether the car came in contact with the deceased, he may be impeached by the evidence of witnesses in regard to statements by him to the contrary, which he denied upon cross-examination; and it is a question for the jury whether such statements were made by the witness, as testified by the impeaching witnesses. (Id.)

32. **ACTION FOR DEATH—COLLISION OF STREET-RAILWAY CAR WITH BREWERY WAGON—INSTRUCTION—PRESUMPTION OF NEGLIGENCE—QUESTION OF FACT.**—In an action by an administratrix against a street-railway company and a brewery company to recover damages for the death of a passenger upon a street-car, resulting from a collision between the car and a brewery wagon, it was proper to refuse an instruction that there was a presumption of negligence against both companies defendant from the fact of the injury to the deceased, in the absence of a concession that the instrumentalities of both defendants caused the injury. In such case, what instrumentality or instrumentalities caused the injury is a question of fact for the jury. (*Harrison v. Sutter Street Ry. Co.*, 549.)
33. **BASIS FOR PRESUMPTION OF NEGLIGENCE FROM INJURY—APPLICABILITY OF PRESUMPTION—INDEPENDENT DEFENDANTS—OPEN QUESTION.**—The presumption of negligence from the fact of injury is based upon probability, and only arises where the injury results from the management and control by the defendant of the thing which caused the injury, and cannot apply as against a defendant who did not have such management and control, nor in favor of a plaintiff who seeks to recover damages for injuries against two defendants who are wholly independent of each other, where it is an open question as to which defendant had control of the particular instrumentality that caused the injury. (Id.)
34. **ACTION FOR DEATH—RUNAWAY HORSE—BURDEN OF PROOF—NEGLIGENCE NOT PRESUMED—NONSUIT.**—In an action by an executrix to recover for the death of the testator, caused from being struck by a wagon drawn by a runaway horse, the burden of proof is upon the plaintiff to show the negligence of the driver. In the absence of such proof, there is no presumption of negligence arising from the fact that the horse ran away; and the burden is not thereby cast upon the owner of the team, sued as defendant, to explain how or why the runaway occurred; but the defendant is entitled to a nonsuit. (*Rowe v. Such*, 573.)
35. **EVIDENCE—VERDICT OF CORONER'S JURY NOT ADMISSIBLE—HEARSAY.**—The verdict of the coroner's jury is not admissible to prove that the death of the plaintiff's testator was caused by the negligence of the defendant. The verdict could not bind the defendant, who was not a party to it, and upon the question of negligence the opinion of the coroner's jury was inadmissible hearsay. (Id.)
36. **EXPERT EVIDENCE—COMPETENCY AND SKILLFULNESS OF DRIVER—HYPOTHETICAL QUESTION—PROPER EXCLUSION.**—The competency and skillfulness of the driver of the wagon was not a proper subject

NEGLIGENCE (Continued).

for expert evidence; and where the only issue related to the negligence of the driver, a hypothetical question addressed to a witness, calling for his opinion as to the competency and skillfulness of the driver, which assumed facts not alleged or proved, was properly excluded. (Id.)

37. **RESPONSIBILITY FOR LATENT DEFECTS IN CAR WHEEL.**—An electric railway company, charged with negligence for the excessive speed of its car, is responsible for latent defects in the wheel of the car, causing it to run off the track, to plaintiff's injury, which might have been discovered by proper tests during the process of its manufacture, notwithstanding the defects could not have been discovered after the vehicle came into its possession. (*Siemens v. Oakland, S. L., & H. E. Ry.*, 494.)

See *Bona Fide Purchaser*, 4; *New Trial*, 6; *Warehouseman*, 6.

NEGOTIABLE INSTRUMENT.

1. **ACTION UPON DRAFT—LIABILITY OF DRAWEES—WRITTEN PROMISE OF ACCEPTANCE.**—An unconditional promise, in writing, to accept a draft or bill of exchange is a sufficient acceptance thereof in favor of every person who, upon the faith thereof, has taken the bill for good consideration, and a promise by the drawee, to the effect that a bill, when due, shall meet due honor, amounts to an acceptance, and renders the drawee liable in an action upon the draft, as an accepted draft, by an assignee thereof for value. (*James v. E. G. Lyons Co.*, 189.)
2. **PROMISE BY SELLERS OF MERCHANDISE TO MEET DRAFTS BACK.**—Where sellers of merchandise in this state, to purchasers in another state, made an agreement with them, evidenced by various letters, to assist them in meeting drafts for the price, under their understanding that the purchasers were to draw back upon the sellers for such part of the price as they could not meet upon maturity of the drafts of the sellers, on the faith of which agreement the draft in suit was made back by the purchasers, and assigned to the plaintiff for value, such agreement, interpreted in the light of all the letters evidencing it, and of a subsequent letter written and received while plaintiff held the draft, in answer to an immediate notification of the draft by the purchasers to the sellers, that the draft would be "duly protected on presentation," constitutes an unconditional promise, in writing, to accept the draft back, which renders the drawees liable thereupon to the plaintiff. (Id.)
3. **CONSTRUCTION OF CODE—GENERAL PROMISE TO MEET BILLS OF EXCHANGE.**—Section 3197 of the Civil Code, making an unconditional promise, in writing, to accept a bill of exchange a sufficient acceptance in favor of every assignee for value who takes upon faith of the promise, is not to be construed as requiring that the promise, to be binding under the statute, shall relate to and describe a particular bill, or the bill sued upon. It is sufficient that it can be fairly inferred from the language of a general promise to

NEGOTIABLE INSTRUMENT (Continued).

meet bills of exchange, that it was intended to include the one upon which the action is based. (Id.)

4. **AUTHORITY FOR DRAFT—PROMISSORY WORDS IMPLIED.**—The promise to accept and pay a draft is necessarily implied from words of the drawees, authorizing the draft to be made upon them. (Id.)
5. **LIMITATION OF AMOUNT AND PURPOSE—PROMISE NOT CONDITIONAL.**—The fact that the purchasers were authorized to draw back for an amount needed to meet the sellers' drafts does not make their promise to meet the drafts back condition, rather than absolute; but the limitation is merely one as to the amount and purpose for which the drafts were to be made, and the promise is absolute within those limitations. (Id.)
6. **CHECK—ORDER DRAWN UPON ONE BANK BY ANOTHER—DISHONOR—ACTION AGAINST DRAWER.**—An order drawn upon a bank is a check, though drawn by another banker; and if such check is dishonored by the bank upon which it is drawn, an action lies in favor of the owner of the check, or his assignee, against the bank which drew the check. (*Garthwaite v. Bank of Tulare*, 237.)
7. **PURCHASE OF CHECK TO PAY DEBT—MISCARRIAGE—PAYMENT TO FORGER—OWNERSHIP BY PURCHASER.**—Where the check sued upon was purchased by a debtor of the payee, and mailed to him, to be collected by him and applied upon his indebtedness, but the payee never received it, and it was paid upon a forged indorsement to another person, such payment gave the drawee no right to retain the check, or to claim reimbursement from the drawer, but the check remained the property of the purchaser. (Id.)
8. **DEMAND BY PAYEE—AGENCY FOR PURCHASER—NOTICE OF DISHONOR—LIABILITY OF DRAWEE.**—A demand by the payee, upon the bank upon which the check was drawn, was, in legal contemplation, made by him as agent for the purchaser, and its refusal to pay, while the check was wrongfully retained in its possession, was a dishonor of the check, and notice of such dishonor, given to the bank which drew the check, fixed its liability to the purchaser, or his assignee, for the money originally paid for the check, which may be enforced at any time within the statute of limitations. (Id.)
9. **DUTY OF DRAWER AFTER NOTICE—NEGLIGENCE—INSOLVENCY OF DRAWEE—LOSS OF DRAWER.**—Upon receiving notice of dishonor, the bank which drew the check should either demand the return of the check or the return of the money; and where it neglected to do either, it must bear any loss occurring through intervening insolvency of the drawee, after the liability of the drawer was fixed. (Id.)
10. **BURDEN OF PROOF—GENUINENESS OF CHECK—PROOF OF FORGERY.**—In assuming that the drawee properly paid the check, the drawer must prove the genuineness of its indorsement; and where the indorsement was shown at the trial to be a forgery, the liability of the drawer to repay the money received from the purchaser of the check is established. (Id.)

NEGOTIABLE INSTRUMENT (Continued).

11. **LIABILITY OF DRAWER FOR INTEREST.**—The liability of the drawer of the check is the same as that of a first indorser of any other negotiable instrument, and, under the provisions of section 3116 of the Civil Code, construed with section 3177 of the same code, the court was justified in awarding interest upon the check from its date. (Id.)
12. **PRODUCTION OF CHECK AT TRIAL—EVIDENCE—NON-PAYMENT.**—The production of the check at the trial, without any genuine indorsement thereof by the payee, is sufficient evidence that it was not paid to him, in the absence of evidence showing such payment. (Id.)

See Partnership.

NEW TRIAL.

1. **PREMATURE PROCEEDINGS—MINUTE ENTRY—PROCEEDINGS AFTER FINDINGS AND JUDGMENT—MANDAMUS TO SETTLE STATEMENT.**—Proceedings on motion for a new trial, based solely upon a minute entry of a decision, which did not purport to be a judgment, and was not signed, it appearing that no findings or judgment had been filed or entered, were premature and invalid; and where findings were filed and judgment entered after denial of the premature motion, new proceedings for a new trial, thereafter instituted in due form, were the only valid proceedings. It is no defense to *mandamus* to compel the settlement of a statement upon such new proceedings, that a statement had been settled and certified upon the premature proceedings. (Fountain Water Co. v. Dougherty, 376.)
2. **NOTICE—STATEMENT—MOTION UPON MINUTES—APPEAL FROM ORDER—PRESUMPTIONS.**—The statement, whether made on motion for a new trial, or after a motion made on the minutes of the court, need not embody the notice of the motion, or its contents; and the presumption upon appeal in either case is, that the notice was duly given, and that the specifications contained in the statement conform to those in the notice. Where the motion was made upon the minutes of the court, it will also be presumed upon appeal, without a formal statement to that effect, that the specifications set out in the statement were in fact argued, as well as contained in the notice. (Schneider v. Market Street Ry. Co., 482.)
3. **ORDER GRANTING NEW TRIAL—SPECIFICATION OF GROUND—REVIEW UPON APPEAL.**—Under an order granting a new trial on the sole ground specified of the misconduct of a juror, the question of the sufficiency or insufficiency of the evidence, though specified in the motion, will not be reviewed upon appeal from the order, but the review will be confined to such misconduct, and to asserted errors of the court in the trial of the case. (Siemsen v. Oakland, S. L., & H. E. Ry., 494.)
4. **MISCONDUCT OF JUROR—IMPEACHMENT OF VERDICT—AFFIDAVIT AS TO ADMISSIONS.**—The alleged misconduct of a juror in visiting, during the trial, the scene of the accident in controversy, and using

NEW TRIAL (Continued).

his examination to show the jurors how, in his judgment, the accident occurred, cannot be proved by an affidavit of his declarations or admissions to that effect, made after the close of the trial. His inability to impeach his own verdict on that ground extends to proof of his admissions, made to the same effect. (Id.)

5. TIME OF MISCONDUCT OF JUROR.—There is no proper distinction between the misconduct of a juror during the trial, before retirement, and his misconduct after retirement, as respects the inadmissibility of his affidavit or admissions to impeach his verdict. (Id.)
6. TRIFLING MISCONDUCT OF JUROR—ACTION FOR NEGLIGENCE—EXCESSIVE SPEED OF ELECTRIC CAR—IMMATERIAL VISIT TO TRACK.—Proof of trifling misconduct of a juror, which could not be prejudicial to the moving party, is not ground for disturbing a verdict; and in an action to recover for injuries, caused by the negligence of an electric railway company, where the sole ground of recovery is the excessive speed of an electric car, causing it to run off the track, to plaintiff's injury, and the defense was that the accident was caused by a latent, undiscoverable defect in the wheel, the visit of a juror to the track, and his inspection thereof, is not such misconduct as would justify a new trial. (Id.)
7. STATEMENT PREPARED TOO LATE—VOID EXTENSION OF TIME—APPEAL FROM ORDER.—An extension of time, by the judge, in which to prepare a statement on motion for a new trial, though within the limit of thirty days, is void, if the time previously allowed to the moving party had fully elapsed while the mover was in default. The judge has no authority thereafter to settle the statement; and if settled, it cannot be considered upon appeal from the order denying the new trial. (Freese v. Freese, 48.)

See Divorce, 2.

NUISANCE. See Water and Water Rights, 2.

OFFICE AND OFFICERS. See Police-officers.

ORDINANCES. See Municipal Corporations; Negligence, 26, 27.

PARTIES. See Corporations, 4; Mechanic's Liens, 4; Mortgage, 9, 15; Pleadings, 5.

PARTITION.

COMPENSATION OF REFEREES—DISCRETION—APPEAL.—In an action for partition, the trial court has a wide discretion in determining the amount of compensation which ought to be paid to the referees for their services; and where the record upon appeal does not disclose that such discretion was abused, the compensation fixed will not be disturbed, and the judgment will be affirmed. (Treadwell v. Treadwell, 158.)

PARTNERSHIP.

1. **ACTION UPON FIRM NOTE—EVIDENCE OF COPARTNERSHIP—SUPPORT OF FINDING.**—In an action upon a firm note, executed in the name of one of the defendants by him, evidence that such name was a firm name, and that the defendants were associated together in such name for the purpose of carrying on business together, and dividing the profits between them, and that the defendant who executed the note in such name was the managing partner, and that the note in suit was made by him as a member of the firm, and that the other defendant recognized the copartnership, is sufficient to support a finding that they were copartners under that firm name when the note was executed. (*Krasky v. Wollpert*, 338.)
2. **INDIRECT FINDING AS TO EXECUTION OF NOTE BY FIRM—ADVERSE COMPLETE FINDING—PREJUDICE NOT PRESUMED.**—The finding that, as a member of the firm of copartners, the defendant named executed the promissory note sued upon, is the equivalent of a finding that the copartners made it; and the failure to find directly and positively that the note was executed by the firm cannot be presumed prejudicial to the appellant, where it is evident that a more complete finding would be adverse to the appellant. (*Id.*)
3. **CONSTRUCTION OF FINDINGS—INFERENTIAL FINDINGS.**—The findings, in so far as they are not positive and certain, should receive a construction which will uphold rather than defeat the judgment; and where, from the facts found, other facts may be inferred which will support the judgment, the inference will be deemed to have been made by the trial court. (*Id.*)
4. **SETTING ASIDE FINDINGS AND JUDGMENT—NEW FINDINGS AND JUDGMENT—POWER OF COURT—VOID ACTION—APPELLANT NOT PREJUDICED.**—Where the court in such action set aside the findings and judgment, and made new findings and a new judgment, conceding, as contended by the appellant, that the court had no power to do so, the appellant could not be prejudiced thereby, where it appears that the conclusion and judgment were the same upon both sets of findings. If the court had no such power, the order setting aside the first findings and judgment must be deemed void, and the first judgment must be deemed the only valid judgment, and it is sufficient, if the first findings support it, and are sustained by the evidence. (*Id.*)
5. **OMISSION IN TRANSCRIPT—DESCRIPTION OF NOTE—OBJECTION UPON APPEAL.**—The omission of the printed transcript, by a clerical error, to show that the copy of the note sued upon, appended as an exhibit to the complaint, contained a promise to pay, or the name of the payee, though the certified record must be accepted as correct, cannot be objected to upon appeal for the first time, where no objection to the sufficiency of the note was interposed in the court below, either by demurrer or by objection to evidence. (*Id.*)

PERJURY. See Criminal Law, 64-66.

PLACE OF TRIAL.

1. **ACTION BETWEEN CORPORATIONS—INJURY TO LAND—PRINCIPAL PLACE OF BUSINESS—VENUE—CHANGE OF PLACE OF TRIAL.**—In an action brought in the city and county of San Francisco, between corporations, each of which has its principal place of business therein, to recover damages for injury to real property situated in Kern County, the defendant is not entitled to demand, as matter of right, to have the cause tried in that county, under section 392 of the Code of Civil Procedure, without any showing of grounds "to change the place of trial, as in other cases," as contemplated by section 16 of article XII of the constitution. (*Miller & Lux v. Kern County Land Co.*, 586.)
2. **CONSTRUCTION OF CONSTITUTION.**—Section 16 of article XII of the constitution, which provides for the venue of action against corporations, and permits the action, at the election of the plaintiff, to be prosecuted "in the county where the principal place of business of said corporation is situated, subject to the power of the court to change the place of trial, as in other cases," is self-executing, and applies to actions of tort, as well as those founded in contract. Though it is in the nature of a code provision for procedure, it cannot be repealed or limited in its operation by statute, and any statute inconsistent therewith must give way. (*Id.*)

See *Ferries*, 5.

PLEADINGS.

WATER RIGHTS—INJUNCTION—PRESCRIPTIVE TITLE—FINDINGS OUTSIDE OF ISSUES—JUDGMENT ENFORCING CONTRACT.—In an action to enjoin interference with the water rights of the plaintiff, where the sole theory of the complaint was that the plaintiff had acquired a prescriptive title to the water rights by adverse user, but the findings and decree were wholly outside the issues tendered, and were based solely on the theory that the plaintiff's user of the water and ditch was with the consent of the owners, and under an oral license and agreement, which is specifically enforced by the judgment, the judgment cannot be upheld, and must be reversed. (*Schirmer v. Drexler*, 134.)

2. **FAILURE TO PROVE COMPLAINT—INCONSISTENT CASE IN PROOF—FAILURE TO OBJECT TO VARIANCE—NON-WAIVER.**—Where the plaintiff wholly failed to sustain the burden of proof as to the allegations of his complaint, and proved an inconsistent case, going to show that the case alleged did not exist, the failure of the defendant to object to such proof cannot be deemed a waiver of the variance, so as to support findings and a decree for the plaintiff upon the inconsistent case not alleged. (*Id.*)
3. **RECOVERY LIMITED TO CAUSE OF ACTION ALLEGED.**—A plaintiff can only recover upon the cause of action alleged, and not upon some other cause of action which may be developed by the proofs. (*Id.*)
4. **REFUSAL OF AMENDMENT AT TRIAL—DISCRETION—ABSENCE OF WRITING AND VERIFICATION.**—The refusal of leave to the defendant

PLEADINGS (Continued).

to make a proposed amendment at the trial was within the discretion of the court; and that discretion was properly exercised, where the proposed amendment was objected to, not only as being too late, but also as not being in writing, and without verification of the facts. (*Todhunter v. Klemmer*, 60.)

5. **AMENDMENT OF COMPLAINT AT TRIAL—PARTIES—CHANGE OF ACTION—DISCRETION.**—The trial court did not abuse its discretion by refusing an application to amend the complaint at the trial, so as to change the action from one against the defendant, to an action against the defendant and another party jointly, which would have been, in effect, another action, and would probably require a trial *de novo*. (*Petterson v. Stockton and Tuolumne R. R. Co.*, 244.)
6. **AMENDMENT OF COMPLAINT—OMISSION OF CAUSE OF ACTION.**—The plaintiff, when granted leave to file an amended complaint, may entirely omit one of the causes of action set forth in the original complaint. The defendant cannot be prejudiced by the abandonment of a cause of action alleged against him. (*Concannon v. Smith*, 14.)
7. **AMENDMENT WRITTEN IN ORIGINAL COMPLAINT.**—The writing of an amendment in the original complaint, so as to change it in matter of substance, makes it none the less an amended complaint, a copy of which must be served upon the defendant. (*Tappendorff v. Moranda*, 419.)

See Abatement; Bond, 2; Deed, 2; Divorce, 1; Eminent Domain, 1, 2; Estates of Deceased Persons, 23; Estoppel, 1; Fraudulent Conveyance, 5, 6; Homestead, 1-3; Judgment, 2, 3, 9; Negligence, 7; Specific Performance, 1; Statute of Limitations, 1, 6; Street-assessment, 12, 16; Vendor and Vendee, 3.

PLEDGE.

1. **PLEDGE OF NOTE AND MORTGAGE—COLLATERAL SECURITY—REMEDY—POWER OF SALE—FORECLOSURE.**—A power of sale given upon a pledge and assignment of a note and mortgage as collateral security by a vendee of the mortgagor, who had assumed such note and mortgage, and given his own note and mortgage to the mortgagee as principal debtor, does not make a sale under the power an exclusive remedy of the pledgee, and he may bring an action in equity to foreclose the collateral security. (*Farmers and Merchants Bank of Stockton v. Copey*, 287.)
2. **EXECUTION BY WIFE OF VENDEE—MARK—SUPPORT OF FINDING.**—A finding that the wife of the vendee of the mortgagor executed the principal note to the plaintiff, and the assignment of the note, and the vendee of the mortgagor, by making her mark, with the proper attestation by a witness, is sufficiently proved by the testimony of such witness, and of the husband that he and his wife "went in and signed the note." The execution of the note by her is also admitted by her denial to a verified complaint, that she

PLEDGE (Continued).

"for any consideration whatsoever, made, executed, and delivered to the plaintiff that certain promissory note," which denial takes issue only upon the consideration, and not upon the making, execution, and delivery, of the note. (Id.)

3. **EXPRESS AGREEMENT TO PAY DEFICIENCY—OMISSIONS IN FORECLOSURE SUIT—LIABILITY OF VENDEE AND WIFE.**—Where the vendee and his wife, who were principal debtors, in their assignment, as security for their debt, of the collateral note and mortgage, expressly agreed "to pay on demand whatever balance may be due after sale of the securities and application of the proceeds," the omission of the pledgor to make the wife of the vendee a party defendant in the foreclosure suit, and his omission to take a deficiency judgment therein against the original mortgagor, and the taking of such judgment only against the vendee, who had assumed payment of the mortgage debt, cannot release or affect the liability both of the vendee and his wife upon their express agreement to pay the amount of the deficiency. (Id.)

See Appeal, 1, 2.

POLICE COURT. See Criminal Law, 12.**POLICE-OFFICERS.**

1. **POLICE DEPARTMENT—MEMBERSHIP OF RETIRED OFFICER.**—A police-officer of San Francisco, retired from active service on account of age, who has not resigned or been dismissed from the department, still remains a member of the department. (Kavanagh v. Board of Police Pension Fund Commissioners, 50.)
2. **POLICE PENSION FUND—WIDOW OF RETIRED OFFICER—VESTED RIGHTS—CITY CHARTER.**—The widow of a police-officer of San Francisco, who had been placed upon the retired list, and pensioned under the act of 1889 creating the police pension fund, and who died from natural causes, prior to the adoption of the city charter, has vested rights in the pension fund, which cannot be affected by the subsequent adoption of the city charter revising the law governing police pensions in San Francisco. (Id.)

POSSESSION. See Bona Fide Purchaser, 2, 3.

PRACTICE. See Abatement; Appeal; Attachment; Bill of Exceptions; Costs; Evidence; Findings; Insolvency; Judgment; Mechanic's Liens, 3, 4; New Trial; Partition; Place of Trial; Pleadings; Summons.

PROBATE LAW. See Estates of Deceased Persons.**PUBLIC LANDS.**

1. **UNITED STATES SURVEY—LOCATION OF TOWNSHIP—DETERMINATION BY MONUMENTS IN FIELD.**—The location of a township upon the pub-

PUBLIC LANDS (Continued).

- lic land of the United States is where the government surveyor has actually lined it out, and is to be determined by the monuments placed by him in the field. (*Harrington v. Boehmer*, 196.)
2. **CONTROL OF PLAT BY FIELD-NOTES—CORRECTION OF PLAT.**—In case of discrepancy between the field-notes and the plat, the plat must give way to the field notes; and the land department may properly correct the plat so as to conform to the field-notes. The plat as corrected supersedes the original. (*Id.*)
 3. **EJECTMENT—FAILURE OF PLAINTIFF'S TITLE—SWAMP-LAND PATENT—TRACT NOT INCLUDED IN GOVERNMENT SURVEY.**—A plaintiff in ejectment must fail, where he claims under a swamp-land patent from the state, which confers no title, where the field-notes of the government survey of the township and the corrected plat thereof show that there is no such tract of land as that described in the patent; and it is immaterial that such tract appears upon the original plat of the survey. (*Id.*)
 4. **EVIDENCE—LOCATION OF RIVER AS BOUNDARY—CHANGE NOT PROVED—HARMLESS RULING.**—Where the Sacramento River formed a boundary of the land claimed by the plaintiff, and the case was tried and findings made on the theory that there had been no change in the location of the river since 1850, a change thereof will not be presumed. The refusal to allow a witness for plaintiff to prove its location since 1850 will be deemed harmless, where no offer appears to prove a change of location by the witness. (*Id.*)
 5. **PROOF OF FIELD-NOTES—CERTIFIED COPY—HARMLESS EXCLUSION OF ORIGINAL.**—A certified copy of the field-notes of the government survey is competent evidence thereof, and if placed in evidence by the defendants, the exclusion of the original notes, when offered in rebuttal, was harmless, where no discrepancy between them was made to appear. (*Id.*)

See Swamp and Overflowed Lands.

PUBLIC SCHOOLS. See Schools.

QUIETING TITLE. See Dedication, 2; Ejectment, 1; Judgment, 13.

RAILROAD. See Eminent Domain; Negligence, 25-33.

RAPE. See Criminal Law, 68-72.

RECEIVER. See Appeal, 9; Bond, 3; Contempt; Mortgage, 14, 15; Summons.

RECLAMATION DISTRICT.

LEGAL INTEREST UPON UNPAID WARRANTS—APPLICATION OF STATUTES.
—The unpaid warrants of reclamation districts bear legal interest, under sections 3456 and 3457 of the Political Code, which is to

RECLAMATION DISTRICT (Continued).

be computed at the rate of seven per cent per annum, as fixed by section 1917 of the Civil Code. Section 71 of the County Government Act, providing for five per cent interest upon warrants not paid for want of funds, applies to county warrants, and does not include the warrants of reclamation districts. (National Bank of D. O. Mills & Co. v. Greenlaw, 673.)

See Taxation, 5, 6.

REDEMPTION. See Mortgage, 5, 15-17; Taxation, 1-4.

RES ADJUDICATA. See Judgment, 4, 5.

SALES.

1. **FAILURE OF ENTIRE CONTRACT—DELIVERY AND ACCEPTANCE OF PART—WAIVER—ACTION FOR GOODS SOLD AND DELIVERED.**—Notwithstanding the failure of an entire contract for the sale of a specified quantity of goods, yet if the vendee accepts and retains part thereof delivered to him, he thereby waives the condition precedent as to the delivery of the remainder, and the vendor may recover the value of the part delivered, in an action for goods sold and delivered. (Ontario Deciduous Fruit Growers' Association v. Cutting Fruit Packing Co., 21.)
2. **SALE OF MINIMUM QUANTITY OF FRUIT—FAILURE FROM DROUGHT—IMPOSSIBILITY OF FULL PERFORMANCE—NON-LIABILITY FOR DAMAGES.**—Where a sale was made by plaintiff to defendant under a written contract for a minimum quantity of specific varieties of peaches growing and to be grown on specific orchards, which defendant's agents inspected, and which were so affected by an unexpected drought as to render full performance of the contract impossible, the non-performance thereof in full was excused, and the plaintiff is entitled to recover the value of all of the peaches grown, which were delivered to and retained by the defendant, with knowledge of the facts, and is not liable in damages, by way of counterclaim or otherwise, for failure fully to perform the contract, owing to *vis major*, without his fault. (Id.)
3. **SUBSTITUTION OF OTHER PEACHES.**—The defendant could not require the plaintiff to substitute other peaches than those contemplated in the written contract, in performance thereof; nor thereby preclude a recovery for peaches already received and retained by the defendant. (Id.)
4. **PAROL EVIDENCE—IDENTIFYING SUBJECT OF CONTRACT—"SUNDRY ORCHARDS."**—Where the written contract of sale called for a certain quantity of fruit from "sundry orchards in Ontario and Cucamonga," parol evidence was admissible to identify the subject of the contract, and to explain what orchards were meant. (Id.)
5. **PAROL AGREEMENT AS TO QUANTITY—HARMLESS RULING—IMPLIED CONDITION.**—The admission of oral evidence, that it was agreed

SALES (Continued).

that the minimum quantity was not to be delivered unless it was grown on the plaintiff's orchards, is not prejudicial error. It could do no harm to prove by oral evidence that which was an implied condition of the agreement. (Id.)

SCHOOLS.

1. **SCHOOL FUNDS—STATE AND COUNTY TAXES—SUPPORT OF COMMON SCHOOLS.**—The school law contemplates and requires that all school funds raised from state and county school taxes shall be applied exclusively to the support of common schools, consisting of primary and grammar schools in each school district. (Stockton School District of San Joaquin County v. Wright, 64.)
2. **APPORTIONMENT BY COUNTY SUPERINTENDENT—"AVERAGE DAILY ATTENDANCE" IN DISTRICT—SPECIAL SCHOOLS NOT INCLUDED.**—The apportionment required to be made by the county superintendent of the unapportioned residue of the school funds "to the several districts, in proportion to the average daily attendance in each district during the preceding year," must be based upon the "average daily attendance" in the common schools of the district, not including attendance upon any high school or evening school established therein. (Id.)
3. **STATUTORY CONSTRUCTION—LEGISLATIVE INTENT—ABSURDITY.**—In the interpretation of a statute the court must look at the context, and the result that would follow, in order to arrive at the legislative intent. A literal construction will not always obtain, particularly when such construction leads to an absurdity. (Id.)
4. **SCHOOL DISTRICT—CREDIT OF MONEY IN TREASURY—TRANSFER BY SUPERINTENDENT OF SCHOOLS—ACTION UPON OFFICIAL BOND.**—A school district has no proprietary right to the money standing to its credit in the county treasury, and has no right to recover it, and cannot maintain an action against the county superintendent of schools, and his sureties upon his official bond, to recover money to its credit which the superintendent is alleged to have transferred wrongfully to the unappropriated school funds of the county, without authority of law to reapportion the same. (Gridley School District v. Stout, 592.)
5. **MISTAKEN PERFORMANCE OF DUTY—DISCRETION—SUPERINTENDENT OF SCHOOLS NOT LIABLE IN TORT—CORRECTNESS OF JUDGMENT NOT DETERMINED.**—The superintendent of schools cannot be sued personally, in tort, for a mistaken performance of an official duty, involving the exercise of judgment and discretion. The question whether his judgment was rightly exercised will not be determined in an action upon his official bond, involving the transfer of school moneys. (Id.)

See Contract, 1, 2.

SERVICE. See Appeal, 2.

SPECIFIC PERFORMANCE.

1. **PLEADING—INSUFFICIENT COMPLAINT—ADEQUATE CONSIDERATION—FAIRNESS.**—A complaint for the specific performance of a contract to convey land must state facts showing that it is based upon an adequate consideration, and is, as to the defendant, fair and just; and if it fails to do so, it is error to overrule a general demurrer thereto. (*Stiles v. Cain*, 170.)
2. **CONTRACT BETWEEN HUSBAND AND WIFE—UNDUE INFLUENCE NOT PRESUMED.**—A contract entered into between husband and wife is not presumed to have been obtained by undue influence on the part of the wife; though, in seeking specifically to enforce the contract, she must allege and prove facts showing its fairness and adequacy. (*Id.*)

STATUTE OF FRAUDS.

1. **PAROL AGREEMENT TO TRANSFER LAND.**—A parol agreement to transfer, without consideration, a strip of land which is part of a well-defined tract abutting upon a well-recognized boundary between adjoining tracts, as to which there is no dispute or uncertainty, is ineffective, as being in direct violation of the statute of frauds. (*Nathan v. Dierssen*, 282.)
2. **ERECTION OF DIVISION FENCE—UNAUTHORIZED ACT OF TENANT—FINDING AGAINST EVIDENCE.**—The erection of a division fence between the two tracts, so as to include the strip as part of the defendant's land, by a tenant of the plaintiff who is a successor in interest of the tract from which the strip was granted by parol, cannot bind or estop the plaintiff, where it appears that the tenant had no authority to adjust the boundary. A finding that the plaintiff, with knowledge of the original agreement, erected a division fence upon the line originally agreed to by parol, is held to be against the evidence. (*Id.*)

See Corporations, 6.

STATUTE OF LIMITATIONS.

1. **BARRED NOTE AND MORTGAGE—ACTION UPON NEW PROMISE—CONSIDERATION—SUFFICIENCY OF COMPLAINT.**—A complaint setting forth a note and mortgage, and alleging that in an action to foreclose the mortgage it was adjudged that they were barred by the statute of limitations, and that they were so barred, and that subsequent to the bar of the statute the defendant, on certain dates specified, in writings signed by him, acknowledged the indebtedness and promised to pay the same, is not upon the note, but upon the new promise, of which the barred note and mortgage set forth constituted the consideration, and the complaint states a sufficient cause of action upon the new promise, as against a general demurrer. (*Concannon v. Smith*, 14.)
2. **NEW PROMISES PRIOR TO FORECLOSURE SUIT—RES ADJUDICATA—MATTER NOT IN ISSUE.**—The fact that the new promises, in writing, declared upon, though made after the bar of the statute, were made before the commencement of the foreclosure suit, does not

STATUTE OF LIMITATIONS (Continued).

make the adjudication in that suit, that the note and mortgage were barred by the statute of limitations, an adjudication against the cause of action upon the new promise, which was not in fact pleaded or placed in issue in the former suit. (Id.)

3. **EVIDENCE OF NEW PROMISE—LETTERS—PART PAYMENTS—IMPLIED PROMISE.**—Letters signed by the defendant, asking plaintiff to send a statement of his affairs, and inclosing part payments upon his indebtedness to the plaintiff, and expressing a hope to send more, and to pay the interest, it appearing that there was no other indebtedness from defendant than the barred note and mortgage, are evidence of an implied promise to pay that debt. (Id.)
4. **FORMAL ACKNOWLEDGMENT OR PROMISE NOT REQUIRED—RECOGNITION OF SUBSISTING DEBT.**—The statute does not prescribe any form in which the new acknowledgment or promise shall be made. It need not be formal; and it is sufficient, if the writing shows that the writer regards or treats the indebtedness as subsisting; and from the acknowledgment of a subsisting indebtedness the law implies a promise to pay it, based upon the consideration of the old debt. (Id.)
5. **MORTGAGE—NEW PROMISE AFTER BAR OF STATUTE—RENEWAL OF MORTGAGE.**—The lien of a mortgage is not extinguished by lapse of time, so long as the principal obligation is kept alive, and suit can be brought upon the original promise; but a new promise, made after the bar of the statute has fully accrued upon the original promise, cannot have the effect to renew or continue the mortgage, the lien of which is extinguished by such bar of the statute. (Weinberger v. Weidman, 599.)
6. **RENEWAL OF NOTE—REDUCTION OF INTEREST—PLEADING—ARGUMENTATIVE AVERMENT OF EVIDENCE NOT ADMITTED—SUFFICIENCY OF DENIAL.**—An averment that a certain sum is due, with interest at a specified rate, which is less than the face of the note, from a certain date, "such reduction of interest having been agreed to by both parties," on a date specified, prior to the bar of the note, is not an averment that the note was then renewed by a written promise signed by the defendant, and does not state the ultimate fact of promise to pay it, or any fact material to the plaintiff's case, but only contains mere argumentative matter of evidence of doubtful inference, inserted only to anticipate a defense, and the failure to deny the averment thus made does not admit it. Any possible implication of the renewal of the note is sufficiently denied by a denial that the defendant ever promised to pay the note. (Id.)

See Estates of Deceased Persons, 21, 24; Fraudulent Conveyance, 5, 7; Judgment, 4, 6; Mortgage, 8, 9, 12.

STATUTES.

1. **REVISION OF CODE—CONSTITUTIONAL LAW—IMPROPER ENACTMENT—INSUFFICIENT TITLE.**—The act of March 8, 1901 (Stats. 1901, p.

STATUTES (Continued).

117), entitled "An act to revise the Code of Civil Procedure of the state of California, by amending certain sections, repealing others, and adding certain new sections," is unconstitutional and void, both because the law revised was not re-enacted and published at length as revised, and because it does not embrace but one subject, expressed in its title, as required by section 24 of article IV of the state constitution. The mere reference to the Code of Civil Procedure does not express any subject. (Lewis v. Dunne, 291.)

2. **STATUTORY CONSTRUCTION—DEPARTURE FROM LITERAL IMPORT.**—Where it is evidence from the whole tenor of a statute, and from acts *in pari materia*, that the legislature could not have intended the consequences of a literal construction of its language, and such construction would lead to great inconvenience, if not to an absurdity, the literal construction will not be followed. (Pool v. Simmons, 621.)
3. **REPEAL OF CODE PROVISIONS—IMPLICATION NOT FAVORED.**—Repeals by implication are not favored; and a subsequent act will not repeal prior code provisions by implication, where force and effect can be given to both. (Id.)

See Community Property, 3; License, 2, 3.

STOCK AND STOCKHOLDERS. See Corporations.

STREET-ASSESSMENT.

1. **CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT.**—The street-assessment law of this state, in providing that the expense of street-work is to be assessed in proportion to the frontage of the lots, is not repugnant to the fourteenth amendment of the Federal constitution. (San Francisco Paving Co. v. Bates, 39.)
2. **VALIDITY OF ASSESSMENT—PRIMA FACIE EVIDENCE—AUTHORITY OF SECRETARY TO BID FOR CORPORATION—PRESUMPTION—BURDEN OF PROOF.**—The assessment and other documents connected therewith are *prima facie* evidence of its regularity and correctness; and from such evidence, a bid for the street-work, signed in the name of a corporation by its secretary, which was accepted by the board, in the absence of evidence to the contrary must be presumed to have been shown to the board to have been authorized by the corporation. The burden of proof is on the defendant to establish the contrary, and to show any invalidity or irregularity of the act of the board in accepting the bid. (Id.)
3. **ADVERTISEMENT FOR BIDS—ORDER TO READVERTISE—DESIGNATION OF NEWSPAPER.**—Where the original notice for bids was properly advertised and posted, a subsequent order to readvertise for bids, without designating any newspaper, must be construed as referring to the original order for its terms. (Ellis v. Witmer, 249.)
4. **NECESSITY FOR READVERTISEMENT—LIMITATION OF TIME—PRESUMPTION.**—A readvertisement for bids is not necessary, unless the original order limited the time for bids; and it cannot be presumed

STREET-ASSESSMENT (Continued).

that a time was limited therefor, where it is not so made to appear. (Id.)

5. **ANTEDATED BOND FOR UNPAID ASSESSMENTS—DELAY IN MINISTERIAL ACTS.**—The bonds to be issued by the city treasurer for the amount of unpaid assessments should be issued and dated at the expiration of the thirty-days' credit allowed by the Street-improvement Act from the date of the warrant; and where, by reason of delay in the ministerial acts to be performed by the city treasurer, a bond was not issued until after that date, it was properly dated as of the date when it should have been issued. (Id.)
6. **SALE UNDER DELINQUENT BOND—IRREGULARITIES—RELIEF IN EQUITY—PAYMENT OF SUM DUE.**—Where it appears that the assessment and bond were valid, a sale under a delinquent bond cannot be annulled in equity for irregularities in selling under the bond for an excessive amount, or upon insufficient notice, or at an improper place, or upon a defective certificate, unless on condition of paying the sum due. Where no such condition was imposed by the court, and there is no offer in the complaint to pay what is due, a judgment annulling the sale must be reversed. (Id.)
7. **SALE FOR PRINCIPAL AND INTEREST OF BOND.**—A sale for the principal and the interest of the bond to the date of sale is not for an excessive amount. The bond does not cease to bear interest after it becomes delinquent. (Id.)
8. **INSUFFICIENT NOTICE OF SALE—PERSONS DELINQUENT NOT NAMED.**—A notice of sale, not conforming to the requirements of section 41 of the act of 1891, and of section 3764 of the Political Code, referred to in the Street-improvement Act, and omitting the names of the persons delinquent, is fatally insufficient. The fact that the names of the persons delinquent cannot be ascertained from the bond is not material, since they can be ascertained from the proper records. (Id.)
9. **PLACE OF SALE.**—The place of sale under a delinquent bond, assuming that it was to be determined by the provisions of section 3768 of the Political Code as it stood prior to its repeal, must be "in front of the court-house, or in front of the tax-collector's office," as the board of supervisors may by resolution have directed, for all state and county taxes. The board cannot authorize such sales to be made "in the tax-collector's office." (Id.)
10. **SEWERS—FLUSH-TANK—INSUFFICIENT DESCRIPTION IN RESOLUTION—VOID BID AND CONTRACT.**—A resolution of intention to improve certain streets by constructing sewers thereon, with cribbing, man-holes, and a flush-tank, which wholly fails to describe the dimensions of the flush-tank, or the materials from which it is to be constructed, or where or how it is to be connected with any one of the sewers, or to show whether one flush-tank would serve for all of them, and which is not aided in description by any specifications therefor, fails to describe a material part of the work; and such failure vitiates the resolution as a whole, and renders void a bid

STREET-ASSESSMENT (Continued).

and contract to do the work proposed by the resolution, inclusive of the flush-tank. (*McDonnell v. Gillon*, 329.)

11. **RESOLUTION OF INTENTION JURISDICTIONAL—CARE IN DESCRIPTION.**—The resolution of intention is the initial step, by which alone the board acquires jurisdiction to order the work done, and it must so describe it as to convey an intelligent idea of the improvement, and its nature and extent. A little more care in this initial and jurisdictional step would protect all parties, and avoid all question, by a proper description of each distinct part of the proposed improvement. (*Id.*)
12. **ACTION UPON STREET-ASSESSMENT—SUFFICIENCY OF COMPLAINT—GENERAL DEMURRER—GROUNDS OF SPECIAL DEMURRER—OBJECTION UPON APPEAL.**—In an action upon a street-assessment, where the complaint states a cause of action sufficient to support the judgment, a general demurrer thereto was properly overruled; and grounds of special demurrer not urged in the trial court, relating to the manner in which the facts are stated, cannot be urged upon appeal from the judgment. (*Belser v. Allman*, 399.)
13. **PRIMA FACIE CASE—BURDEN OF PROOF.**—Under a complaint sufficient to sustain a judgment for the enforcement of the lien of the assessment, a *prima facie* case for a recovery by the plaintiff is made by the production, at the trial, of the assessment, with the documents connected therewith, and of the affidavit of demand and non-payment; and the burden is upon the defendant to allege and affirmatively prove any error, defect, or irregularity that may have supervened in the proceedings subsequent to the ordering of the work. (*Id.*)
14. **DESCRIPTION OF WORK—CONSTITUTIONALITY OF LAW—CASES AFFIRMED.**—Held, upon the authority of *Haughwout v. Hubbard*, 131 Cal. 675, that the work contracted for in this case, and for which the assessment was made, was sufficiently described in the resolution of intention, and, upon the authority of *Hadley v. Dague*, 130 Cal. 207, that the Street-improvement Act is constitutional and valid. (*Id.*)
15. **NOTICE FOR SEALED PROPOSALS—FIXING OF TIME BY CLERK—ABSENCE OF ORDER OF COUNCIL—PRESUMPTIONS.**—The fact that the clerk fixed the time in the notice calling for sealed proposals, which was posted and published, and that the city council made no order fixing such time, does not vitiate the notice, conceding it to be unauthorized, where it does not appear that the limitation so fixed prevented any one from presenting a proposal. Such prevention is not to be presumed; and if the limitation made by the clerk was unauthorized, all persons must be assumed to have known that fact. (*Id.*)
16. **FICTITIOUS NAMES—DISMISSAL—FINDING—FAILURE TO AMEND COMPLAINT.**—Where the action was dismissed as to defendants sued by fictitious names, and the court found that the appellant was at all times the owner of the land, the appellant is not prejudiced by

STREET-ASSESSMENT (Continued.)

the failure of the plaintiff to file a formal amendment of the complaint striking out the fictitious names. (Id.)

17. **DATE OF WARRANT—RECORD—NOTICE—LIMITATION OF TIME FOR APPEAL.**—Under the provisions of the Street-improvement Act, the limitation of “thirty days after the date of the warrant” in which to appeal from the assessment is to be counted from the date of the record of the warrant, and not from its actual date, if different therefrom. The date of the record of the warrant is that from which notice is imputed to those who have the right to appeal. (*Cotton v. Watson*, 422.)
18. **DELIVERY AND RETURN OF WARRANT.**—The warrant cannot be delivered to the contractor, and has no operative function, until it has been recorded; and it is the intention of the legislature that the time within which an appeal might be taken from the assessment, and within which the warrant should be returned to the superintendent, should be the same,—viz., thirty days from the time when he was entitled to receive the warrant. (Id.)
19. **STATUTORY CONSTRUCTION—RIGHTS OF PARTIES—INTENTION OF LEGISLATURE AS TO DATE OF WARRANT.**—The Street-improvement Act ought not to be construed as placing it within the power of the superintendent of streets, by failure to record the warrant, essentially to impair or destroy the rights of the parties. The legislature contemplated that the date of the warrant, and the record of the warrant, should be the same. (Id.)
20. **ACTION UPON STREET-ASSESSMENT—EVIDENCE—PRIMA FACIE CASE—UNTENABLE OBJECTIONS.**—In an action to enforce a street-assessment, the warrant, assessment, certificate, and diagram, with the affidavit of demand and non-payment, are admissible as *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council, and of the right to recover in the action. Objections to the admissibility of such evidence for other purposes, and that the facts essential to the validity of the assessment do not appear, are untenable, and must be disregarded. (*Reid v. Clay*, 207.)
21. **RECORD OF PAPERS—PRESUMPTION.**—The statute does not expressly require that the assessment and accompanying papers shall be recorded, in order to be effective as *prima facie* evidence; and it seems that such proviso or condition cannot be deemed imposed upon the provisions of the act. It must be presumed from such *prima facie* evidence that the contract and all papers required by law to be recorded were recorded. (Id.)
22. **INDORSEMENTS UPON PACKAGES—PRESUMPTION.**—It must be presumed that indorsements made at different times upon a package of papers produced from the engineer’s office, comprising the diagram, warrant, return, and certificate of the engineer, referred to by the indorsements made thereon, respectively, were in the package when the indorsements were made. It must be inferred that the papers required by law to be attached together were so attached,

STREET-ASSESSMENT (Continued.)

- and it cannot be presumed, contrary to the indorsement, that the certificate of the engineer was not in the package, or was wrongfully made elsewhere than in the engineer's office. (Id.)
23. **ASSIGNMENT OF CLAIM BY GENERAL MANAGER OF CORPORATION—PROOF OF AUTHORITY.**—An assignment of the street-assessment claim was sufficiently proved, where it was shown that it was made by the general manager of the corporation which did the work, and that he was in the habit of executing assignments and contracts on behalf of the corporation with the knowledge, assent, and acquiescence of its board of directors. (Id.)
24. **CONTRACT OF CORPORATION—EXECUTION BY SECRETARY—SEAL—PRESUMPTION—RATIFICATION—ABSENCE OF RESOLUTION.**—The contract for the street-work, by a corporation, executed by its secretary, with the corporate seal attached, must be presumed, in view of the corporate seal, and of the *prima facie* case made by the plaintiff, to have been executed by the authority of the corporation; and where it appears that it was the custom of the corporation for its secretary, when present, to execute its numerous contracts, and that the contract was ratified by appeal of the corporation from the original assessment, proof of the absence of a resolution authorizing the contract cannot defeat it. (Id.)
25. **DESCRIPTION OF WORK—EXCEPTION OF WORK ALREADY DONE—DECLARATION OF POWER.**—The description of the work, in the assessment contract and notice for bids, as being for laying granite curbs on a certain street, between two other streets, "where not already laid," and paving the roadway thereupon with bituminous rock, "where not already so paved," does not disclose any delegation of power to the street superintendent or contractor to determine the character and amount of the work to be done. (Id.)
26. **COMPLIANCE WITH SPECIFICATIONS—MATERIALS—SATISFACTION OF SUPERINTENDENT OF STREETS.**—A provision in the contract that the contractor will do the described work "in a good and workmanlike manner, under the direction and to the satisfaction of the superintendent of streets," and "in compliance with the specifications hereunto attached, and made part of this contract," is, in effect, the provision required by section 4 of the act of 1889 (Stats. 1889, p. 171), that "the materials used shall comply with the specifications, and be to the satisfaction of the superintendent of streets." (Id.)
27. **NEW ASSESSMENT—ORDER—NEW DIAGRAM AND WARRANT IMPLIED.**—Where it appears that the original assessment, diagram, and warrant had been set aside upon appeal of the contractor, and "a new assessment, correcting a clerical error in making the former assessment," had been ordered, it is necessarily implied in the order that there must be a new and corrected diagram and warrant, if rendered necessary by the alteration in the assessment. It cannot be objected that the new assessment does not conform to the decision of the board, if such non-conformity does not affirmatively appear. (Id.)

STREET-ASSESSMENT (Continued.)

28. **CERTIFICATE OF ENGINEER.**—A certificate of the engineer is not required, or required to be recorded, except in the case provided for in subdivision 10 of section 5 of the act of 1889 (Stats. 1889, p. 171). Though he is empowered by section 34 of the act to make a certificate of the work done, such certificate, when made, is simply to assist the superintendent of streets in determining whether the contract has been satisfactorily performed, and its contents, if satisfactory to the superintendent, are immaterial to the validity of the lien. (Id.)
29. **STREET-IMPROVEMENT ACT—CONSTITUTIONAL LAW—CASE AFFIRMED.**—The Street-improvement Act of 1889 (Stats. 1889, p. 171) is constitutional and valid. *Cohen v. City of Alameda*, 124 Cal. 500, affirmed. (Id.)
30. **DEMAND AND RETURN—SPECIFICATION OF PAYMENT—PRESUMPTION OF AUTHORITY.**—The demand and return are not required by the statute to specify the person to whom the money is to be paid, that being obviously understood; and the authority of the party making it is to be presumed, in the absence of evidence to the contrary. (Id.)
31. **DEMAND BY ASSIGNEE AS AGENT.**—The fact that the demand made by the assignee of the claim of lien was made as agent of the original contractor is immaterial. (Id.)
32. **ALLOWANCE OF ATTORNEY'S FEES—LIEN.**—The plaintiff is entitled to have the attorney's fees allowed by the court in the action to enforce the assessment made a lien upon the land assessed. (Id.)

SUMMONS.

FORECLOSURE OF MORTGAGE BY RECEIVER—NOTES LEVIED UPON UNDER EXECUTION—EVIDENCE—VOID PERSONAL JUDGMENT—PUBLICATION OF SUMMONS AGAINST NON-RESIDENT.—In an action by a receiver to foreclose a mortgage securing notes which were levied upon under execution, evidence of the judgment roll under which the execution was issued is inadmissible to support the foreclosure, where it appears upon the face thereof that it was a void personal judgment rendered against the owner of the notes, who was a non-resident of the state, and did not appear in the action against him, and that the service of summons upon him was made by publication only, so that the court acquired no jurisdiction of his person. (*Boring v. Penniman*, 514.)

See *Insane Persons*, 8.

SURETY. See Attachment.

SWAMP AND OVERFLOWED LANDS.

1. **PUBLIC LANDS—CRITERION OF SWAMP-LAND GRANT—UNITED STATES PATENT TO SETTLER.**—The criterion of the state's title to swamp and overflowed land granted by the act of September 28, 1850, is that the greater part of the smallest legal subdivision, consisting

SWAMP AND OVERFLOWED LANDS (Continued).

of forty acres, was too wet for cultivation. If the greater part thereof was fit for cultivation, the subdivision was not included in the grant, and the patent of the United States to a settler thereupon will confer upon him the legal title. (*Fredericks v. Zumwalt*, 44.)

2. **ABANDONMENT OF STATE'S CLAIM IN FAVOR OF SETTLERS AND PATENTEES.**—By the act of March 10, 1874 (Stats. 1873-74, p. 137), the state expressly abandoned all claim to lands, as swamp and overflowed, which had been patented to pre-emption or homestead settlers by the United States, or which were then occupied by such settlers in good faith under declaratory statements filed thereupon. (Id.)
3. **SWAMP LANDS ACCEPTED BY STATE—NEARNESS TO TOWN—VOID CERTIFICATE OF PURCHASE.**—By the act of April 4, 1870 (Stats. 1869-70, p. 875), all swamp and overflowed lands situated within two miles of any town or village were excluded from grant by the state; and, upon supposition of the state's title to lands so situated, a certificate of purchase thereof by the register of the state land-office, as swamp-land, is void. (Id.)

See Public Lands, 3; Reclamation Districts.

TAXATION.

1. **TAX DEED—INSUFFICIENT NOTICE TO REDEEM.**—A tax deed cannot be sustained where it appears that the property was unoccupied, and that the notice to redeem was posted on the premises too late to bring it within the period of thirty days next previous to the expiration of the time for redemption, and that the notice was not published in every issue of a newspaper published during said period, nor during the period of thirty days next before the purchaser applied for a deed, as required by law. (*Walsh v. Burke*, 594.)
2. **AFFIDAVIT OF PURCHASER—REBUTTAL—SUPPORT OF FINDING.**—Though the affidavit of the purchaser established the fact *prima facie* of a publication in the first paper published after the posting of the notice, evidence in rebuttal thereof is admissible; and the testimony of a witness, that he made a close examination of the newspaper of that date, and that the notice was not published therein, is sufficient to sustain a finding that there was an issue of the paper published on that day, and that the notice was not published therein. (Id.)
3. **ISSUE OF PAPER NEXT PRIOR TO TAX DEED—UNSUPPORTED FINDING—ABSENCE OF PROOF—CLAIMANT UNDER DEED NOT INJURED.**—One who claims under the tax deed is not injured by an unsupported finding that there was a regular issue of the paper on July 4th, next prior to the tax deed dated July 11th, and that the notice of redemption was not published therein, where such claimant failed to prove either a publication of the notice on that date, or that there was no issue of the paper thereon. (Id.)

TAXATION (Continued).

4. **BURDEN OF PROOF UPON CLAIMANT UNDER DEED—FINDING IN ABSENCE OF PROOF.**—The burden of proof is upon the claimant under the tax deed to show a compliance with the statute as to the notice of redemption; and where there is an entire absence of proof in relation to the last publication required by the law to support the deed, it is the duty of the court to find against him on that fact; and the absence of proof in such case does not make the finding against evidence. (Id.)
5. **PROPERTY OF RECLAMATION DISTRICT—STATE AGENCY—PROPERTY OF STATE—STATE AND COUNTY TAXES.**—A reclamation district is a public agency of the state; and property acquired thereby, which is indispensable to the execution of its objects, is public property of the state, within the meaning of the constitution, and is exempt from state and county taxes as such. (Reclamation District No. 551 v. County of Sacramento, 477.)
6. **CONSTRUCTION OF POLITICAL CODE—STATE NOT BOUND BY GENERAL WORDS.**—The state is not bound by general words in the Political Code upon the subject of taxation, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it. (Id.)
7. **MANDAMUS TO AUDITOR—TAXES REFUNDED BY SUPERVISORS—MISTAKE IN LISTING CREDITS—ASSESSOR'S CHANGE OF TRUE BALANCE.**—*Mandamus* will lie to compel the auditor to audit and approve a claim properly allowed by the supervisors, upon the assessor's recommendation, for the refunding of a sum of taxes erroneously paid, on account of a clerical mistake of the taxpayer's book-keeper in listing credits in an excessive sum of one hundred thousand dollars, which led the assessor to change a truly stated balance of credits over debts, so as to increase the balance by that excessive sum, without notice to the taxpayer, thus exacting taxes upon said sum which were not in fact due. (Pacific Coast Co. v. Wells, 471.)
8. **EFFECT OF VOLUNTARY PAYMENT—POWER OF SUPERVISORS TO REFUND TAXES—CONSTRUCTION OF CODE.**—The fact that the taxes paid upon said excessive sum of one hundred thousand dollars were voluntarily paid, without protest by the taxpayer, cannot affect the power and duty of the supervisors to refund such taxes as having been erroneously or illegally collected, under the provisions of section 3804 of the Political Code. That section is remedial, and should be liberally construed to carry out its intent and object, to prevent the inequitable retention of money by the county, which was improperly collected, and to which the county has no right. (Id.)

See Insane Persons, 6; Mortgage, 3, 4; Schools, 1-3.

TENANTS IN COMMON. See Bona Fide Purchaser.

TRUST.

1. **TRANSFER BY TRUSTEE—GOOD FAITH OF PURCHASER—FINDING AGAINST EVIDENCE—CONSIDERATION—PRIVATE DEBT—NOTICE—**

TRUST (Continued).

AGENCY.—A finding that a transfer of trust property by a trustee to his daughter-in-law was made to her as a *bona fide* purchaser for value, without notice of the trust, or of the rights of the plaintiff as a beneficiary, is against evidence, where proof of the consideration was not satisfactory, and the evidence in part showed a deed of gift, and in part that there was some settlement of a private debt of a firm, which consisted of the trustee and his son, the husband of the grantee, and it appeared that the husband acted as her agent in the transaction. The full knowledge of her agent, acting within the scope of his authority, charged her with notice of the invalidity of the conveyance, which was void, both as being in contravention of the trust, and also as having been made in payment of a private debt of the trustee. Such deed was voidable as to her, as one taking with notice, at the instance of the *cestui que trust*. (Chapman v. Hughes, 641.)

2. **ESTOPPEL IN PAIS—CONSENT OF CESTUI QUE TRUST—PLEADING—FINDING.**—If the *cestui que trust* knew of and assented to the conveyance from the trustee to his daughter-in-law, an estoppel *in pais* would be raised against him, and he would not be heard to disavow an act to which he had formally assented, where the parties changed their condition upon the assurance of his consent. But such estoppel *in pais*, to be available, must be pleaded, proved, and found, and cannot be considered in the absence of a pleading and finding to support it. (Id.)
3. **SUIT IN EQUITY BY BENEFICIARY—ACCOUNTING—AVOIDANCE OF TRANSFERS BY TRUSTEE—AUGMENTATION OF TRUST FUND.**—In a suit in equity, brought by a beneficiary having an interest in trust property, for an accounting against his trustee, and to avoid transfers made by the trustee of the trust property to other parties made defendants, all transfers thereof made by the trustee to any of the co-defendants without consideration, or to persons taking with notice of the plaintiff's rights under the trust, must go to augment the trust fund, to abide an equitable adjustment of rights as between the plaintiff and his trustee, upon the accounting between them. (Id.)
4. **TRANSFER AS COLLATERAL SECURITY—PROTECTION OF TRANSFEREE—RESIDUE SUBJECT TO TRUST.**—Where a transfer of property by the trustee, as collateral security for indebtedness, is protected, and cannot be assailed *in toto*, the residue of the property remaining after the debt is paid must go into the trust fund. (Id.)
5. **TRANSFER OF NOTES AND MORTGAGES—GOOD FAITH OF ASSIGNEES—NOTICE—ATTORNEY OF TRUSTEE—SUBSEQUENT EMPLOYMENT BY ASSIGNEE.**—Where securities, consisting of notes and mortgages, were transferred for value by the trustee to purchasers who took without actual notice of the trust, such purchasers are not chargeable with notice by reason of the knowledge acquired by an attorney, who acted solely as attorney of the trustee in relation to the transfer, though such attorney was afterwards employed by a bank which

TRUST (Continued).

- became a second assignee of the securities for value, without knowledge of the trust. (Id.)
6. **TRANSFER FOR LESS THAN FACE VALUE—ACTUAL VALUE NOT SHOWN.**—The fact that securities of the face value of thirty-one thousand dollars were transferred by the trustee for a cash value of twenty thousand dollars is not indicative of fraud or want of good faith in the transaction, where there is no evidence tending to show the actual value of the securities. (Id.)
7. **FINDING AGAINST ADMISSION OF PLEADINGS.**—Where the pleadings admitted that the trustee had made certain conveyances to his wife, a finding contrary to such admission, that he had made no such conveyances, must be set aside. (Id.)
8. **CONTRACTS OF PLAINTIFF AND THIRD PARTY WITH TRUSTEE—SET-OFF—ACCOUNTING—EVIDENCE—FORMER ADJUDICATION—SUPERSEDED CONTRACT—COLLATERAL FINDINGS.**—Where the plaintiff sought an accounting under a contract with the trustee to divide with the plaintiff the net proceeds of lands purchased in the trustee's name, after repaying the purchase-money from sales thereof, and to divide the residue of the lands, and it appeared that plaintiff also agreed that the indebtedness of a third party to the trustee remaining due after an accounting under a deed of trust should be offset against the plaintiff, the rights of the parties to an equitable accounting and set-off, according to the facts upon competent evidence, are not concluded by a former decree, in an action by the plaintiff and such third party against the trustee as an alleged partner for an accounting under a former syndicate agreement, in which the defendant pleaded and the court found that the syndicate agreement was canceled and superseded without performance thereof by such trust deed, and by an agreement with the plaintiff. Collateral findings in the former action, that the trust deed was modified as alleged by the defendant, are not conclusive; and such former decree is not admissible in evidence against the plaintiff and such third party. (Id.)
9. **ESTOPPEL BY VERDICT OR JUDGMENT—IMMATERIAL AND COLLATERAL ISSUES.**—While a general verdict or judgment operates as an estoppel as to such matters as were necessarily considered and determined, it is never conclusive upon immaterial or collateral issues. (Id.)
10. **RIGHTS OF BENEFICIARY—ACCOUNTING OF TRUSTEE FOR VALUE—INSOLVENCY—FINDING—ENFORCEMENT OF TRUST.**—The beneficiary is not concluded by a finding of the court against an allegation of the insolvency of the trustee, who offered to account for the value of the lands disposed of; and, without regard to the benefits or injuries which may follow, the beneficiary is entitled to enforce the trust agreement to the letter, and to avoid every disposition of lands contrary thereto, of which the vendee had knowledge or notice. (Id.)
11. **MONEY JUDGMENT—ESTOPPEL.**—The beneficiary cannot be compelled to accept a money judgment awarded against the trustee, and

TRUST (Continued).

is not estopped thereby to recover property wrongfully disposed of by the trustee. (Id.)

12. **EXCHANGE OF PROPERTIES BY TRUSTEE EMPOWERED TO SELL—CHARGE OF CASH TO TRUSTEE—AVOIDANCE OF EXCHANGE.**—The power of the trustee to sell does not include a power to exchange the trust property for other lands, and where such exchange was effected with one who had knowledge of the terms of the contract between the trustee and the plaintiff, the plaintiff, as beneficiary, is entitled to avoid the exchange, notwithstanding the trustee charged himself with cash on account thereof. (Id.)
13. **CONVEYANCES BY WAY OF MORTGAGE—VALUABLE CONSIDERATION—PRE-EXISTING DEBT—NOTICE—BURDEN OF PROOF—AGENCY.**—Conveyances by the trustee, by way of mortgage, to secure a pre-existing debt for moneys loaned to the trustee, were for a valuable consideration; but the burden resting upon the plaintiff to prove knowledge or notice of his rights is sustained by proof that the agent who acted for the mortgagee in the transaction had such knowledge, which must be imputed as notice to the principal. (Id.)
14. **PAYMENT OF PURCHASE-MONEY BY TRUSTEE—RESULTING TRUST—EXPRESS TRUST.**—Notwithstanding that the entire purchase-money for the land was paid for by the trustee, and that he had a beneficial ownership therein, and that no trust could have resulted to the plaintiff by operation of law, yet the plaintiff, who is not seeking to enforce a resulting trust, may enforce his rights under an express trust formally declared by an instrument in writing, signed by the trustee. (Id.)
15. **ASSUMPTION OF MORTGAGE BY TRUSTEE—PART PAYMENT—ACCOUNTING—REIMBURSEMENT.**—Where, by the agreement between the parties, the trustee was to discharge a mortgage, upon payment of which he was entitled to reimbursement from the proceeds of sales of the property, if only part of the mortgage was paid, if he should be charged in the accounting with the residue, provision must also be made therein for reimbursing him, (Id.)
16. **CONSOLIDATION OF ACTIONS—SINGLE JUDGMENT—DEFENDANTS NOT IN PRIVACY—REVERSAL UPON APPEAL—NEW TRIAL LIMITED.**—Where the record shows the consolidation of several actions which were tried as one, and a single judgment entered, involving the rights of defendants between whom there is no privity or community of interest, where the judgment is reversed and a new trial is granted, a defendant who has established the validity of his purchase from the trustee will not be required to litigate the matter anew, but the new trial will be limited to issues between parties as to whom the judgment was erroneous, and confined to the subject-matter of findings held not sustained by the evidence. (Id.)

See Husband and Wife, 2.

UNDERTAKINGS. See Appeal; Bond.

VENDOR AND VENDEE.

1. **ACTION TO FORECLOSE CONTRACT OF SALE—DISCLAIMER—ADVERSE CLAIM OF CO-DEFENDANT.**—In an action by a vendor to foreclose a contract of sale by reason of the default of the purchaser in making payments thereon, where a co-defendant, who was joined as an alleged claimant under the contract, disclaimed any interest therein, and set up a claim of title adversely both to the vendor and to the purchaser, such adverse claim is not a proper subject of litigation in the action. (*Stearns Ranchos Co. v. McDowell*, 562.)
2. **DETERMINATION OF ADVERSE CLAIM—VOID JUDGMENT—MODIFICATION UPON APPEAL.**—A judgment in such action, foreclosing the contract of sale as to all of the defendants, and enjoining the defendants from setting up any claim adverse to the plaintiff, and awarding to the plaintiff possession as against the defendants, is void as to the defendant who disclaimed all interest under the contract, and asserted the adverse claim. The judgment being broad enough in its terms to include the adverse claim, though void in relation thereto, will be ordered modified, upon appeal of the defendant who asserted it, so as to exclude such defendant from the operation of the judgment. (*Id.*)
3. **VERBAL CONTRACT—ACTION TO RECOVER BACK MONEY PAID—SUFFICIENCY OF COMPLAINT.**—A purchaser of land under a verbal contract, who has paid part of the purchase-money, cannot recover it back from the vendor, merely because the contract is verbal; but, to sustain an action therefor, he must allege and prove full performance or tender of performance of the terms of the verbal contract on his part, and the default of the vendor in refusing to convey upon proper tender and demand for a deed, or that the vendor had become unable to carry out the contract; and if the complaint fails to show such facts, it does not state a cause of action. (*Lafey v. Kaufman*, 391.)
4. **ANSWER OF VENDOR—EVIDENCE.**—The vendor was entitled to give evidence to prove an answer setting up continual readiness and willingness to convey the land by sufficient deed upon full performance of the contract on the plaintiff's part, and that plaintiff has refused fully to perform the contract; and it was error for the court to refuse to hear such evidence. (*Id.*)
5. **BOND TO CONVEY MINE—POSSESSION—REVERSION OF IMPROVEMENTS—OPTION OF PURCHASER.**—A bond to convey a mine, conditioned for a deed thereof on a certain date, provided the purchaser should have paid to the vendor a specified sum, and which gave permission to the purchaser to work the mine, and agreed that in the event of his failure to pay at the time named, the mining property and all improvements thereon should revert to the vendor, and the obligation should be void, only conferred an option upon the purchaser to take the property within the time prescribed. (*Cook v. Enright*, 1.)

VENDOR AND VENDEE (Continued).

6. **ACTION TO RECOVER IMPROVEMENTS REMOVED—TENDER OF DEED UNNECESSARY.**—There being no mutual and dependent covenants in the bond to convey the mine, the vendor was not required to tender a deed to the purchaser, in order to put him in default, before commencing an action against the purchaser to recover the possession of improvements wrongfully removed by the purchaser, or the value thereof. (Id.)
7. **CONTRACT OF SALE—RESCISSION BY VENDOR—RECOVERY OF PAYMENTS BY PURCHASER.**—Where a contract of sale of real estate is rescinded by the vendor for non-payment of further installments of the purchase-money, by retaking possession of the land, with notice to the purchaser that the contract is absolutely abandoned and determined, the purchaser may recover back the installments of purchase-money which have been paid under the contract so rescinded. (Heilig v. Parlin, 99.)
8. **FORMER JUDGMENT—ACTION TO QUIET TITLE—CROSS-COMPLAINT FOR PURCHASE-MONEY—RES ADJUDICATA.**—A former judgment in an action to quiet title, brought by the vendor against the purchaser after the vendor had retaken possession, in which the purchaser pleaded the contract of sale, and alleged performance thereof to the date of ouster, and filed a cross-complaint, praying judgment for a return of the purchase-money paid, but did not allege a rescission of the contract of sale, is not *res adjudicata*, in bar of a subsequent action to recover the purchase-money paid, in which a rescission of the contract of sale is alleged and admitted. (Id.)

See Specific Performance; Statute of Frauds.

VENUE. See Place of Trial.

WAREHOUSEMAN.

1. **BAILMENT—STORAGE OF SPIRITS IN WAREHOUSE—FAILURE TO REDELIVER—PRIMA FACIE CASE—BURDEN OF PROOF—EXCUSE OF FAILURE.**—Where barrels of spirits were stored in a warehouse, proof of the deposit, and of failure of the bailee to redeliver in accordance with the terms of the contract, makes a *prima facie* case for the bailor, and the burden of proof is upon the bailee to excuse the failure to redeliver. (Taussig v. Bode & Haslett, 260.)
2. **LEAKAGE—SHIFTING OF BURDEN.**—Where the bailee shows a return of the barrels stored, and that the contents have been lost by leakage, the burden shifts upon the bailor to prove affirmatively that the leakage was caused by the fault of the bailee. (Id.)
3. **STIPULATIONS LIMITING LIABILITY OF WAREHOUSEMEN—PUBLIC POLICY.**—There is no public policy to be infringed by stipulations limiting the liability of warehousemen for loss or deterioration caused by the inherent qualities of the articles stored, or by defects in the vessels containing them, not caused by fault of the warehousemen. (Id.)

WAREHOUSEMAN (Continued).

4. **WAREHOUSE RECEIPT—PRINTED STIPULATION—LEAKAGE AT OWNER'S RISK—FAILURE OF WAREHOUSEMEN TO INSPECT.**—Where the warehouse receipt contained a printed stipulation that leakage was to be at the owner's risk, the owner of the spirits stored is conclusively chargeable with knowledge thereof, and is bound thereby. In view of such stipulation, it was not actionable negligence for the warehousemen merely to fail to inspect for leakage the barrels of spirits, though they were stored two tiers high, with no passageway between the tiers. (Id.)
5. **DUTY OF BAILOR TO INSPECT—MODE OF PILING BARRELS.**—Under the warehouse receipt, it was the duty of the bailor, and not of the bailee, to inspect the barrels for leakage. For the purpose of such inspection, he could have required a removal of the barrels, or a different mode of piling them. In the absence of any attempt of the bailor at inspection, the mode of the piling of the barrels by the bailee, which does not appear to have been otherwise than customary, is immaterial, even if it be assumed to be improper, as preventing convenient inspection. (Id.)
6. **NEGLIGENCE—ERRONEOUS INSTRUCTIONS.**—Instructions to the effect that even if the leakage was due to the original negligence of the plaintiffs in storing the spirits in leaky casks, the defendant was nevertheless liable for the loss, if by ordinary care he could have discovered and cured the defect, and prevented the loss by leakage or shrinkage of the barrels, from defective cooperage, and allowing to the defendant no benefit whatever from the stipulation against loss from leakage, were erroneous, and require a reversal of the judgment. (Id.)

WATER AND WATER RIGHTS.

1. **WATER RIGHTS—FORMER ADJUDICATION—CHANGE OF PLACE OF DIVERSION.**—In an action by riparian owners to enjoin the diversion of waters to which the plaintiffs were entitled, a former adjudication, giving to the defendant's predecessors the right to divert the waters of a river above its junction with a creek, subject to the condition of leaving specified amounts of water in the stream above that point, does not, of itself, confer the right to take any water below the junction; but, under sections 1412 and 1413 of the Civil Code, the point of diversion may be changed so as to take the amount of water to which defendant is entitled below the junction, provided the rights of the plaintiffs are not interfered with. (*Byers v. Colonial Irrigation Company of Honey Lake Valley*, 553.)
2. **INJUNCTION—PARTIAL NUISANCE—ABATEMENT OF DAM NOT AUTHORIZED.**—Where the dam of the defendants is not found to be a nuisance in itself, but only that it is a nuisance as it has been used to interfere with the plaintiff's rights, the court would not be justified in directing its total abatement or removal; but it is sufficient that the defendant be enjoined from using the dam in such manner as to make it a nuisance by such interference. (Id.)

WATER AND WATER RIGHTS (Continued).

3. **DEFECTIVE DECREE—INTERFERENCE WITH PLAINTIFFS' RIGHTS.**—A decree merely enjoining the defendant from using the dam in the future "as it has been heretofore maintained and used," is defective in not enjoining the defendant from maintaining or using the dam in such manner as to interfere with the plaintiffs' rights, and from diverting from the stream and from the plaintiffs' lands any of the waters of the stream to which, as found, the plaintiffs are entitled. (Id.)
4. **INJURY FROM FLOOD-WATER—BACK-WATER FROM DAM—LEVEL OF LAND—VERDICT AGAINST EVIDENCE.**—A verdict for the plaintiff for damages for injury to his land and crops from flood-water, alleged to have been occasioned by back-water from defendant's dam, is against the evidence, where it affirmatively appears that the back-water from the dam was below the natural level of the plaintiff's land, and there is no evidence to the contrary. (*Lowery v. San Joaquin and Kings River Canal and Irrigation Co.*, 185.)
5. **INFERENCE AGAINST LAWS OF PHYSICS.**—No reasonable inference can be drawn contrary to the laws of physics and the course of nature, that the back-water below the level of the plaintiff's land either caused or contributed to the injury to the plaintiff's land. (Id.)
6. **MEETING OF FLOOD-WATERS WITH BACK-WATERS—SPECULATIVE ASSUMPTION.**—Where it appears that flood-waters from another source stood at plaintiff's levees two feet higher than the highest point of overflow thereof at the dam, the verdict cannot be supported upon the mere speculative assumption that the injury might have been occasioned by the meeting of the waters tending to raise the level of the back-water at the place of meeting. (Id.)
See *Deed; Mines and Mining*, 7, 8; *Pleadings*, 1.

WILLS.

1. **CONSTRUCTION—DEATH OF LEGATEE—BEQUEST TO "REVERT" TO "CHILDREN OF THE FAMILY."**—Under the will of a testator who had never married, and had no family of his own, and whose father's family had ceased to exist as such before the will was made, a provision that in case of the death of any legatee before distribution, "the portion so bequeathed to such legatee shall revert to the family of which such legatee is a member, share and share alike," the word "revert" is not to be construed in the legal and technical sense of "coming back" to its original position as part of the testator's estate, but in the sense of the word "go," and the "family" referred to is that of the deceased legatee, and not that of which the testator had been a member. (*Estate of Bennett*, 320.)
2. **MEANING OF "FAMILY."**—The word "family" is not a technical word. It is of flexible meaning, which is to be determined from the context and the subject-matter to which it relates, and depends upon the particular circumstances of the case. In common parlance, it imports those who live under the same roof with the

WILLS (Continued).

pater-familias; and those who branch out and become members of new establishments cease to be a part of the father's family, in the common meaning of the word. The word may import parents with their children, whether living together or not, or the offspring of a common progenitor, if such intention is manifested from the context. (Id.)

3. **CONSTRUCTION OF CODE—DEATH OF DEVISEE OR LEGATEE DURING LIFE OF TESTATOR—SUBSTITUTION—POWER OF PROVISION.**—Section 1343 of the Civil Code, providing that "if a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place," only declares the effect of such death, where the testator makes no provision for the contingency, and is not a limitation upon his power to make such a provision, by devise or bequest over to the children of the devisee or legatee. (Id.)
4. **PROBATE OF MUTILATED WILL—CONSTRUCTION OF CODE—REMEDIAL PROVISION.**—Section 1339 of the Code of Civil Procedure, relative to the probate of a lost or destroyed will, is remedial in its nature, and is to be liberally construed, as applying to the probate of a mutilated will, some of the provisions of which have been destroyed. (Estate of Camp, 233.)
5. **TESTIMONY OF TWO CREDIBLE WITNESSES—SUBSTANTIAL AGREEMENT—DIFFERENCE AS TO LANGUAGE.**—The requirement that the destroyed provisions must be "clearly and distinctly proved by at least two credible witnesses," does not import that they shall reproduce the exact language of the testator; and if their testimony agrees respecting the substance of the destroyed provisions of the will, those provisions may be established, though the witnesses may differ in their remembrance of the exact language used. (Id.)
6. **MUTILATED OLOGRAPHIC WILL—SIGNATURE OF TESTATOR.**—Where a portion of an olographic will was torn off, including the final signature of the testator, and the substance of the destroyed contents was clearly proved by two credible witnesses, and one competent witness proved that its contents were wholly in the handwriting of the testator, and the initial clause thereof showed that it was intended to be a last will, and contained the name of the testator, the will was properly established. The writing of the name of the testator in the initial clause of the olographic will was, of itself, a sufficient signature. (Id.)

See Estates of Deceased Persons.

WRIT OF ERROR.

WRIT OF ERROR TO SUPREME COURT OF UNITED STATES—STAY OF PROCEEDINGS—CESSATION—DISMISSAL OF WRIT.—A stay of proceedings, consequent upon a writ of error to the supreme court of the United States, fell with the dismissal of the writ of error, and the filing of the mandate thereupon, without the necessity of a specific order vacating the stay. (Galvin v. Palmer, 426.)

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134 Cal. 3-9. ESTATE OF LUX.

Compensation of attorney appointed to represent nonresident interested in estate, is payable only out of interest of person represented, pp. 7, 8.

Approved in Estate of Carpenter, 146 Cal. 666, upholding allowance to executors of payments for advances before paying claims of attorney for minors.

134 Cal. 14-21. CONCANNON v. SMITH.

From an Acknowledgment of Debt, a promise to pay is implied, for which promise old debt is sufficient consideration, p. 20.

Approved in McDonald v. Randall, 139 Cal. 252, extension of time to husband evidenced by note executed by him was sufficient consideration for execution of mortgage on part of wife to secure payment of husband's debt evidenced by such note; Foster v. Bowles, 138 Cal. 351, it is not necessary that trustees in deed of trust should promise to pay indebtedness secured by mortgage in order to establish new date under statute.

134 Cal. 21-26. ONTARIO DECIDUOUS FRUIT GROWERS' ASSOCIATION v. CUTTING FRUIT PACKING CO. 86 Am. St. Rep. 231.

Where Written Contract of Sale called for certain quantity of fruit from "sundry orchards in Ontario" parol evidence is admissible to identify subject of contract and to explain what orchards were meant, p. 25.

Approved in Gardiner v. McDonough, 147 Cal. 320, written contract of sale of "500 sax Bayo more or less at \$3.50 per 100," cannot be varied by parol to show sale was by sample.

134 Cal. 39-41. SAN FRANCISCO PAVING CO. v. BATES.

Street Assessment Law is not repugnant to fourteenth amendment in providing for front foot assessment, p. 40.

Notes Cal. Rep.—324 5169

Approved in *German Sav. etc. Soc. v. Ramish*, 138 Cal. 125, and *Chapman v. Aines*, 135 Cal. 246, both following rule.

Assessment and Other Documents connected therewith are *prima facie* evidence of its regularity, and bid for street work, signed in name of corporation, by its secretary, which was accepted by board, is presumed to have been authorized by corporation, p. 40.

Approved in *City Street Imp. Co. v. Laird*, 138 Cal. 31, following rule.

134 Cal. 60-63. TODHUNTER v. KLEMMER.

Costs Referred to in Code of Civil Procedure, section 581, subdivision 1, are costs of entering judgment, p. 62.

Approved in *Hopkins v. Superior Court*, 136 Cal. 553, when answer seeks no affirmative relief court cannot order clerk not to enter dismissal until plaintiff shall pay costs of defendant and to order case reset for trial upon refusal of plaintiff to comply with such condition.

134 Cal. 64-68. STOCKTON SCHOOL DIST. v. WRIGHT.

School Law Contemplates and Requires that all school funds raised from state and county school taxes shall be applied exclusively for support of common schools, p. 65.

Approved in *Brown v. Visalia*, 141 Cal. 376, city of fifth class organized under municipal corporation act of 1893, has power under Political Code, sections 1669-1671, to establish and maintain high school within city limits, and the trustees of such city may levy special tax for support of such high school.

134 Cal. 76-81. TEDFORD v. LOS ANGELES ELECTRIC CO.

Employer Cannot Escape Liability for neglect of any of duties personally imposed upon him by delegating them to a superior fellow servant, p. 79.

Approved in *Skelton v. Pacific Lumber Co.*, 140 Cal. 511, master liable for injuries to servant caused by action of engineer in causing machinery to run at excessive speed, resulting in breaking of wheel, where engineer was acting under direct orders of superintendent who was vice-principal of master; *Shea v. Pacific Power Co.*, 145 Cal. 682, where deceased was employed as fireman for defendant, and was killed by blowing off of mud-drum of boiler, owing to failure of engineer to employ bursting test after repairs, defendant is liable; *Hough v. Grants Pass P. Co.*, 41 Or. 541, where lineman was working on dead electric wires under immediate supervision of manager just before time to start dynamos, and manager directed another workman to notify men at power-house not to start current till further notice, and employer negligently failed to reach power-house in time, company was liable.

It is Personal Duty of Employer to warn inexperienced employee who is put at dangerous work, requiring skill, of dangers attending such work, of which employer is aware and employee is ignorant, p. 80.

Approved in *O'Connor v. Golden Gate etc. Co.*, 135 Cal. 543, master is liable for injuries to young girl employed in factory to whom foreman assigned duty of sweeping around machine which was sometimes in motion when sweeping done without warning her of danger from cog-wheels.

134 Cal. 84-88. MATTHEWS v. ORMERD.

Constitution, Article 13, Section 4, is a provision against usury, p. 87.

Approved in *Matthews v. Ormerd*, 140 Cal. 581, constitution Art. 13, section 5, is in its nature and elements a usury law for benefit of debtor alone, who may waive it, and if he pays the interest he cannot recover it back.

134 Cal. 114-117. GUARDIANSHIP OF CEAS.

Father Who is Guardian of Estate of minor child, who misappropriates it to own use, is properly chargeable therewith in his accounts, p. 116.

Approved in *Estate of Hamilton*, 139 Cal. 672, guardian who has invested funds of ward in own business is chargeable in final account with amount invested with interest thereon from date at which he received it, compounded annually.

Miscellaneous.—*Cook v. Ceas*, 143 Cal. 227, 147 Cal. 615, reciting history of litigation.

134 Cal. 117-120. SMITH v. SMITH.

Rule that Pending Appeal judgment cannot be used as evidence to establish right adjudicated or to show judgment by estoppel does not prevent its use as evidence to establish a contingent right in defendants sued in action to quiet title to which right decree for plaintiff must be subject, p. 120.

Approved in *Greer v. Greer*, 142 Cal. 525, in action by wife for divorce for desertion and for cancellation of deed of husband to daughter for purpose of enforcing alimony. former judgment for defendant in action by her for maintenance grounded on same desertion, in which court found against desertion and that plaintiff was not entitled to cancellation, though such judgment was suspended by appeal, is admissible to preclude retrial of validity of transfer or of alleged desertion in action for divorce; *Boucher v. Barsalow*, 27 Mont. 102, where judgment for ownership of property was rendered for plaintiff in action of forci-

ble entry and detainer, and appeal taken, judgment was not admissible to show plaintiff's ownership in subsequent action in ejectment by plaintiff in forcible entry and detainer action against defendant therein pending appeal in former action; *Boston etc. M. Co. v. Montana Ore etc. Co.*, 26 Mont. 151, where in action to restrain defendants from removing ore from certain vein on motion for injunction pendente lite, it is shown that in prior action between parties judgment was entered that defendants are owners of vein, court may consider such judgment in determining such motion, though time for appeal has not elapsed and plaintiff intends to appeal therefrom.

134 Cal. 121-124. LOS ANGELES v. LOS ANGELES CITY WATER CO.

Order Settling Accounts of Receiver and directing payment of his compensation by one of the parties, though made before there has been final judgment in action in which he was appointed, is final and appealable, pp. 123, 124.

Distinguished in *Elliott v. Superior Court*, 144 Cal. 506, strangers to action do not become parties of record thereto by being parties to contract, though it is embodied in order of court, nor do they become parties by intervention in special proceeding on application of receiver for leave to install plant to work tailings of mine involved in action; *Free Gold Min. Co. v. Spiers*, 135 Cal. 131, order made pending suit which authorizes receiver appointed to take charge of and work mining property to purchase cyanide plant in order to work tailings, to be paid for out of funds coming into his hands, is nonappealable.

134 Cal. 125-128. WINCHESTER v. BLACK.

Exercise of Discretion of Court in setting aside default under Code of Civil Procedure, section 473, will not be disturbed on appeal in absence of abuse, p. 127.

Approved in *Langford v. Langford*, 136 Cal. 509, discretion of court was properly exercised in setting aside default of plaintiff to alleged cross-complaint, his belief not being entirely unfounded that such cross-complaint did not require answer as containing mere matter of counter-claim.

134 Cal. 134-140. SCHIRMER v. DREXLER.

Where Findings and Decree contradict material allegations of complaint and there are no allegations at all in complaint to which findings and decree can be pertinent, they will not be upheld, p. 138.

Approved in *Hildreth v. Montecito Creek Water Co.*, 139 Cal. 28, conclusion that plaintiff was entitled to injunction cannot be supported either on theory of findings entirely outside of issues tendered by complaint as to ownership of part of waters of creek by appropriation and

use as appurtenant to his land or upon theory of finding that he was beneficiary of public use, entitled to water for which he paid rates, as alleged in complaint; *Kredo v. Phelps*, 145 Cal. 529, where complaint alleged plaintiff in peaceable possession and there was no claim for rent, findings showing ouster from premises, and judgment that he be restored to possession, and should pay defendant certain rent for premises, are outside issues.

134 Cal. 143-150. EX PARTE PFIRRMANN.

Under Political Code, Section 3366, power of supervisors to license business for revenue purposes within limits of municipalities is repealed by implication, p. 148.

Approved in *Sonora v. Curtin*, 137 Cal. 588, municipal corporation act of 1883, section 852, subdivision 10, was repealed by Political Code, section 3366; *Flanigan v. Sierra Co.*, 122 Fed. 27, where county under authority of California Statutes of 1897, page 465, section 277, imposed license fee on sheep kept in county and brought action to collect such fee and pending such action statute was passed which repealed statute of 1897, action to collect license did not abate. Distinguished in *Ex parte Helm*, 143 Cal. 555, city organized under special charter prior to Constitution of 1879 is not since amendment of 1896 to Constitution, article 11, section 6, affected by Political Code, section 3366, enacted in 1901, and may, if authorized by charter, impose license tax for revenue.

Title of Act of 1904, adding new section to Political Code to be known as section 3366, is valid, p. 148.

Approved in *Sonora v. Curtin*, 137 Cal. 590, following rule.

Every Feature of Political Code, Section 3366, indicates purpose to restrict licensing power of supervisors and city councils to matters of regulation alone, p. 148.

Approved in *Ex parte Braun*, 141 Cal. 207, Political Code, section 3366, is not applicable to city governed by charter framed under constitution where such charter confers on its legislative body power to impose and collect license taxes for revenue purposes.

Constitution, Article 11, Section 12, does not prohibit legislature from forbidding corporate authorities to collect license tax for revenue, pp. 148, 149.

Distinguished in *Ex parte Braun*, 141 Cal. 213, Political Code, section 3366, is not applicable to city governed by charter framed under constitution where such charter confers on its legislative body power to impose and collect license taxes for revenue purposes.

134 Cal. 151-157. FARNHAM v. BOLAND.

Ballots Must be Rejected where cross is placed in square opposite which there is no candidate's name, p. 153.

Approved in *Patterson v. Hanley*, 136 Cal. 271, *Kinsaid v. Ried*, 142 Cal. 89, and *Maddux v. Walthall*, 141 Cal. 414, all holding ballots stamped after words "no nomination" are illegal and void.

Ballots Must be Rejected where two crosses are placed after candidate's name, p. 154.

Approved in *People v. Campbell*, 138 Cal. 19, 20; *Salcido v. Roberts*, 136 Cal. 672, and *Patterson v. Hanley*, 136 Cal. 273, all following rule.

Malconduct or Carelessness of Election Officers in discharge of duty, i. e., failure to remove stubs or numbers, cannot prejudice voters, p. 154.

Approved in *Davis v. Grunig*, 143 Cal. 342, where election was otherwise valid at certain precinct, entire vote should not be thrown out in election contest on account of failure of election officers to return tally-lists therefrom as required by law; *Freshur v. Howard*, 142 Cal. 503, failure of election officers through carelessness or ignorance to remove numbers from ballots cast does not leave such an identifying mark as renders ballots illegal.

Where Whole Case is not Presented on Appeal in election contest, appellate court in deciding it will not order final judgment but will remand for new trial, p. 155.

Approved in *Kenworthy v. Mast*, 141 Cal. 275, where finding of superior court as to malconduct of election board was not sustained by evidence as to one precinct which was decisive of election, appellate court cannot order final judgment, but will order new trial; *Patterson v. Hanley*, 136 Cal. 277, upon new trial ordered as result of appeal, court need not recount ballots to which no objection was made at first trial but should take results of such ballots as then ascertained.

134 Cal. 158. **TREADWELL v. TREADWELL.**

In Partition Court has Wide Discretion in determining amount of compensation to be paid referees for their services, p. 158.

Approved in *Mesnager v. De Leonis*, 140 Cal. 405, following rule.

134 Cal. 159-163. **PEOPLE v. FIGUEROA.**

Fact of Immediate Complaint of Small Child who was raped is admissible as tending to show her physical condition at that time though any narrative of what child said is inadmissible, pp. 161, 162.

Approved in *People v. Swist*, 136 Cal. 523, in prosecution for assault with intent to commit crime against nature on small boy, testimony of mother to show complaint made by boy is admissible, but if statement as to what he said is not responsive and no motion to strike out is made, its admission is not prejudicial.

134 Cal. 170-175. STILES v. CAIN.

Complaint for Specific Performance of contract to convey land must state facts showing that it is based on adequate consideration, and is as to defendant, fair and just, p. 172.

Approved in *Fleishman v. Words*, 135 Cal. 262, general rule that complaint for specific performance should state value of land and adequacy of consideration therefor does not apply where facts show that great labor was to be bestowed upon entire tract by way of purchase money for part thereof and that consideration therefor was adequate.

Contract Entered into Between Husband and Wife is not presumed to have been obtained by undue influence on part of wife, p. 174.

Approved in *McDougall v. McDougall*, 135 Cal. 317, following rule.

134 Cal. 183-185. PEOPLE v. WILDER.

Instruction that there is Nothing in Nature of Circumstantial Evidence that renders it less reliable than other classes of evidence is of doubtful character but not prejudicially erroneous, p. 184.

Approved in *People v. Howard*, 135 Cal. 272, following rule.

134 Cal. 189-196. JAMES v. E. G. LYONS CO. S. C. 147 Cal. 70, 75.**134 Cal. 196-201. HARRINGTON v. BOEHMER.**

Location of Township on Government Land is where government surveyor has actually lined it out, p. 199.

Approved in *Yolo Co. v. Nolan*, 144 Cal. 449, in retracing lines of government survey field-notes should be taken, and from the courses and distances, natural monuments or objects and bearing trees described therein, surveyor should endeavor to fix line precisely as called for in field-notes and to retrace steps of original surveyor without regard to equality of subdivisions in acres.

134 Cal. 202-205. PEOPLE v. WARNER.

Defendant's Witness Cannot be Impeached on cross-examination by showing he had been indicted and tried for same offense, without seeking to show he had been convicted of felony, p. 204.

Approved in *People v. White*, 142 Cal. 294, in trial of defendant accused of robbery it was prejudicial error to permit impeachment of defendant's principal witness by introducing records of police court showing prior convictions of misdemeanors.

134 Cal. 207-216. REID v. CLAY.

In Action to Enforce Street Assessment, assessment and accompanying papers are prima facie evidence of regularity of prior proceedings, p. 210.

Approved in *City St. Improvement Co. v. Laird*, 138 Cal. 31, burden is on defendants contesting street assessment to prove that president of corporation who signed contract in corporate name did not have authority to execute it.

Description of Work in Contract and Notice for bids as being for curbs on certain street between two streets "where not-already laid" is sufficient, p. 212.

Approved in *Dowling v. Hibernia etc. Soc.*, 143 Cal. 428, affidavit of posting of notices of street work proposed by resolution which shows that notices were posted along line of proposed improvement. at statutory intervals, is sufficient, notwithstanding exceptions of work within said line; *San Francisco Pav. Co. v. Egan*, 146 Cal. 638, upholding resolution of intention to improve street which excepts portion required by law to be kept in order by railroad having tracks thereon.

Where Certificate of Engineer is required it must be recorded, p. 215.

Approved in *O'Dea v. Mitchell*, 144 Cal. 380, 381, certificate of city engineer as to quantum of the grading and that work was done in accordance with lines and grades is not defective because it does not state that engineer examined the work or measured it; *Chase v. Trout*, 146 Cal. 371, contents of recorded certificate of city engineer are immaterial.

134 Cal. 249-255. **ELLIS v. WITMER.**

Equitable Relief will not be granted against sale under delinquent bond for irregularities, where assessment is valid, and amount due not tendered, p. 253.

Approved in *Couts v. Cornell*, 147 Cal. 562, complaint to restrain execution of tax deed on account of defective description of land in assessment which does not show payment or offer to pay just share of taxes, is demurrable.

134 Cal. 260-268. **TAUSSIG v. BODE.** 86 Am. St. Rep. 250.

Under Warehouse Receipt Containing Stipulation that leakage was at owner's risk, is was duty of bailor and not of bailee to inspect barrels for leakage, p. 266.

Approved in *Dieterle v. Bekin*, 143 Cal. 688, stipulation against liability for loss by fire cannot be construed so as to excuse bailee from exercise of ordinary care to protect property from fire.

134 Cal. 269-278. **NEWHALL v. HATCH.**

Renewal of Note Secured by Mortgage before limitation runs against original note, with reference to third persons dealing with land as that of mortgagor is same as if mortgagor had executed mortgage for amount of renewed note, p. 273.

Distinguished in *Commercial Sav. Bank v. Hornberger*, 140 Cal. 19, a pledgee may maintain an independent action on notes secured by pledge, and judgment in such action must be deemed continuance of original obligation for preservation of lien of pledge under Civil Code, section 2911, as against assignee of pledge by pledgor, who was not made party to action.

Estoppel in *Pais* arising from conduct must be specially pleaded, p. 273.

Approved in *Di Nola v. Allison*, 143 Cal. 115, where there was no plea of estoppel of appellant to question validity of sale and no finding was made upon that question, it cannot be determined on this appeal.

134 Cal. 279-281. **COOK v. LOS ANGELES ETC. RY. CO.**

Refusal to Give Requested Instructions substantially included in charge is not erroneous, p. 281.

Approved in *Muller v. Hale*, 138 Cal. 168, in action for negligence originally brought against two parties, as to one of whom nonsuit was granted and as to other of whom verdict was rendered, it was not necessary to instruct that plaintiff could not recover if injuries were caused by negligence of party in whose favor nonsuit was granted, if it was instructed that no recovery was had unless other defendant was negligent.

134 Cal. 282-286. **NATHAN v. DIERSSEN.** S. C. 146 Cal. 65.

134 Cal. 291-300. **LEWIS v. DUNNE.**

Act of 1901 (Stats. 1901, p. 117), entitled: "An act to revise the Code of Civil Procedure of the State of California, by amending certain sections, repealing others and adding certain new sections," is void, pp. 292-299.

Approved in *People v. Parent*, 139 Cal. 601, omission of words "So help you God," prescribed by Civil Code, section 2094, in form of oath administered to defendant, on which perjury was assigned, is no defense to prosecution for perjury; *Beach v. Von Detten*, 139 Cal. 466, 467, upholding act of March 23, 1901, entitled "An act to amend 'An act to establish a uniform system of county and township governments, approved April 1, 1897,' by amending certain sections thereof, repealing other sections and adding certain sections thereto"; *People v. Swist*, 136 Cal. 521, where form of oath prescribed by Code of Civil Procedure, section 2094, as it stood prior to void amendment of 1901, was administered to witness, with exception of invocation for God's help, false testimony thereunder is perjury; *Pratt v. Browne*, 135 Cal. 653, salary of official reporters is not included in or germane to title of County Government Act (Stats. 1897, p. 546), and provision therefor is void.

Distinguished in *People v. Oates*, 142 Cal. 13, upholding act of 1880, entitled "An act to amend certain sections of the Penal Code, including section 1159 thereof, and to repeal certain other sections and to add section 809 thereto; *Ross v. Aguirre*, 191 U. S. 62, 63, 64, upholding California statute of 1893, entitled "An act to amend section 204, 205 and 208, of the Code of Civil Procedure."

Legislation upon any Imaginable Subject is not invalid because found in any particular code, p. 294.

Approved in *Deyoe v. Superior Court*, 140 Cal. 489, upholding act of 1903, adding sections 131 and 132 to Civil Code, relating to interlocutory decree in divorce.

134 Cal. 301-312. **PEOPLE v. WARD.**

Indictment for Embezzlement against officer of corporation, alleging that by virtue of his trust as such officer there came into his possession, custody and control certain sum, property of said corporation, is sufficient, p. 303.

Approved in *People v. Walker*, 142 Cal. 94, following rule.

Demand for Money Embezzled is not necessary to constitute offense of embezzlement, p. 304.

Approved in *People v. Goodrich*, 142 Cal. 220, following rule.

Where Court Charges Jury in relation to vituperative epithets of prosecuting attorney against defendant, that they must not consider such remarks, error is cured, pp. 311, 312.

Approved in *People v. Mathews*, 139 Cal. 528, where remarks of district attorney objected to were checked by court, and court instructed jury to disregard them, error in such remarks was thereby cured.

Miscellaneous.—*Ward v. Dunne*, 136 Cal. 23, order in criminal case directing entry of judgment *nunc pro tunc*, as of prior date, reciting that judgment was then duly rendered, and that clerk failed to enter it fully and correctly, is order after judgment affecting substantial right of defendant and is appealable.

134 Cal. 313-314. **McFAUL v. MADERA FLUME CO.**

A Qualified Expert may Testify as to relative strength of wrought and cast iron, as material for machine in question, evidence being material to issue, p. 314.

Approved in *Dyas v. Southern Pac. Co.*, 140 Cal. 304, admitting expert evidence of civil engineers of long experience with mechanical principles on which derricks are constructed and operated and their strength and use, as to sufficiency and security of counter balancing and fastening of derrick in question.

134 Cal. 315-319. NAPA STATE HOSPITAL v. FLAHERTY.

If Remedy for Right Created Solely by Statute is repealed while right is still inchoate and not reduced to possession, right is thereby lost, provided repealing statute does not contain saving clause, p. 317.

Approved in *Sonora v. Curtain*, 137 Cal. 590, repeal of subdivision 10 of section 852 of municipal incorporation act of 1883 by Political Code, section 3366, destroyed remedy for enforcement of penal ordinance of city of sixth class provided for in ordinance to recover license tax on attorney which he had refused to pay with penalty for refusal. Distinguished in *Flanigan v. Sierra Co.*, 122 Fed. 27, where county, under authority of California Statutes of 1897, page 465, chapter 277, imposed license fee on sheep kept in county and brought action to collect such fee, and pending such action statute was passed which repealed statutes of 1897, action did not abate.

Treasurer of Napa State Hospital cannot sue in name of hospital to compel payment by father for support of his insane son at former insane asylum, p. 318.

Distinguished in *Napa State Hospital v. Yuba Co.*, 138 Cal. 380, Napa State Hospital, under act of 1897, is vested with all property of Napa State Asylum for Insane, and treasurer in name of such hospital may sue on cause of action then existing in favor of state asylum for support of insane criminals committed by superior court to asylum.

134 Cal. 324-329. SNYDER v. HOLT MFG. CO.

Expert Evidence as to Whether Bolt and Nut used to connect header and separator in sidehill harvester were sufficient and proper for purpose is admissible in action for injuries caused by separation of nut and bolt, p. 327.

Approved in *Dyas v. Southern Pac. Co.*, 140 Cal. 304, admitting expert evidence of civil engineers who are familiar with mechanical principles on which they are constructed and operated and with their use and strength, as to sufficiency and security of counterbalancing and fastening of derrick.

134 Cal. 329-332. McDONNELL v. GILLON.

Resolution of Intention to Construct Sewer with manholes and flush tank must describe dimensions of flush-tank and materials out of which it is to be constructed, pp. 331, 332.

Approved in *Williamson v. Joyce*, 137 Cal. 108, resolution of intention to improve streets by construction of sewers therein which does not mention material with which streets are to be sewered or number of branch sewers or character of automatic flushing apparatus required, does not sufficiently describe work.

134 Cal. 338-343. KRASKY v. WOLLPERT.

Where from Facts Found Other Facts may be inferred which will support judgment, inference will be deemed made by trial court, p. 342.

Approved in People's Home Sav. Bank v. Richard, 139 Cal. 291, finding that defendant was not owner of stock after date of transfer, except as otherwise set forth, is to be construed with other findings showing that fraudulent transfer was then effected, which left the defendant owner only in sense of liability for unpaid capital.

134 Cal. 344-345. MALONE v. ROY.

Time for redemption for sale under foreclosure of mortgage is not extended by passage of statute subsequent to mortgage extending time, p. 345.

Approved in Welsh v. Cross, 146 Cal. 629, applying principal to execution sale on judgment in action on contract.

134 Cal. 350-354. CRANE'S GULCH MIN. CO. v. SCHERRER. 86 Am. St. Rep. 179.

Miscellaneous.—Crane's Gulch Min. Co. v. Scherrer, 137 Cal. 606, reciting history of litigation.

134 Cal. 391-394. LAFFEY v. KAUFMAN, 86 Am. St. Rep. 283.

To Sustain Action for Recovery of part of purchase money paid under verbal contract for sale of land, vendee must allege and prove full performance or tender of performance of verbal contract and default of vendor in refusing to convey on proper tender and demand or that vendor is unable to carry out contract, p. 393.

Approved in Leach v. Rowley, 138 Cal. 716, complaint for recovery of money paid cannot be maintained, in absence of rescission by mutual consent, unless vendor is placed in default, by vendees performing, or offering to perform, their part of agreement, by payment, or offer of payment, in full of balance of consideration.

134 Cal. 399-402. BELSER v. ALLMAN.

Assessment and Accompanying Documents are prima facie evidence of regularity of proceedings, p. 401.

Approved in City St. Impr. Co. v. Laird, 138 Cal. 31, burden is upon defendants contesting street assessment to prove that president of corporation who signed contract in corporate name did not have authority to execute it.

134 Cal. 403-407. ROWE v. HIBERNIA SAVINGS & LOAN SOCIETY.

Declarations of wife, made without knowledge of husband, are not admissible as proof that property was her separate property, p. 407.

Approved in Bashore v. Parker, 146 Cal. 529, following rule.

134 Cal. 408-412. **ASHTON v. ZEILA MIN. CO.**

In this State Courts Exercise both equitable and legal jurisdiction, p. 412.

Approved in *Collins v. Lavery*, 136 Cal. 35, an administrator may sue in equity to enforce an equitable title of estate by setting aside a void deed made by decedent.

134 Cal. 430-434. **SCHUMACHER v. TRUMAN.**

Where One Purchases Land in Possession of Third Party, latter's possession must be open and notorious and exclusive and inconsistent with record title, or purchaser does not take in subordination of his rights, p. 432.

Approved in *Aden v. Vallejo*, 139 Cal. 167, possession by plaintiff of wharf under franchise from city to maintain it was not inconsistent with title of record, and was not of character to put city on inquiry as to title of plaintiff under unrecorded deed, and where such possession had apparently terminated when city acquired title of record from patentee and first recorded its deed, it is not affected by constructive notice of unrecorded deed.

134 Cal. 441-448. **FILIPINI v. TROBOCK.**

Where More than Four Years Elapsed after maturity of note and after distribution of mortgaged land to widow, foreclosure of mortgage is barred as to her, notwithstanding absence of mortgagor from state continuously after maturity of note, p. 445.

Approved in *Brandenstein v. Johnson*, 140 Cal. 32, though mortgage sought to be foreclosed may not be barred as between mortgagor and mortgagee, by reason of absence of mortgagor from state, yet where it appears *prima facie* to be barred by statute, holders of subsequent judgment liens may plead statute as to their liens and may enforce them as superior and paramount to lien of mortgagor; *Commercial Sav. Bank v. Hornberger*, 140 Cal. 19, pledgee may retain possession of property pledged until debt is paid, though it may be barred by statute of limitations.

134 Cal. 461-464. **CALIFORNIA ETC. FRUIT ASSN. v. AINSWORTH.**

To Avoid Circuity of Action it is policy of law that rights of both parties shall be settled in one action, p. 464.

Distinguished in *Cal. Cured Fruit Assn. v. Stelling*, 141 Cal. 721, defendants will not be allowed, in claim and delivery which involves only validity of contracts so far as performed, and is not action to enforce contracts, to raise questions as to whether they are in restraint of trade or against public policy.

134 Cal. 464-466. **MOSS v. ODELL.**

Miscellaneous.—Moas v. Odell, 141 Cal. 336, 338, reciting history of litigation.

134 Cal. 467-470. **FEENEY v. HINCKLEY.** 86 Am. St. Rep. 290.

Limitation does not Begin to Run Against Action on judgment until lapse of time within which appeal might be taken from judgment, p. 470.

Approved in Cook v. Ceas, 143 Cal. 227, statute of limitations of three years fixed by Code of Civil Procedure, section 1805, against sureties on guardian's bond does not begin to run until final discharge or removal of guardian by order of court; dissenting opinion in Estate of Wood, 137 Cal. 145, majority holding effects of divorce are not suspended until year has elapsed under Civil Code, section 61, prohibiting re-marriage, except as between parties, until its expiration.

134 Cal. 471-476. **PACIFIC COAST CO. v. WELLS.**

Fact that Taxes were Paid Voluntarily without protest does not affect power and duty of supervisors to refund them when illegally collected, under Political Code, section 3804, p. 476.

Approved in Stewart etc. Co. v. Alameda Co., 142 Cal. 661, 664, 665, in action based on Political Code, section 3804, to recover from county taxes illegally assessed and collected by county for road purposes on property in city limits, it is not necessary to aver in complaint nor in claim presented to supervisors that taxes were paid under protest.

134 Cal. 477-480. **RECLAMATION DISTRICT v. SACRAMENTO.**

Property Acquired by Reclamation District, which is indispensable to execution of its object, is exempt from state and county taxes, p. 480.

Approved in Ruperich v. Baehr, 142 Cal. 193, upholding Code of Civil Procedure, section 710, providing for payment out of salary of public officers of amount of unpaid judgment, an authenticated copy of which has been filed with auditor.

134 Cal. 482-493. **SCHNEIDER v. MARKET ST. RY.**

Contributory Negligence in Crossing Street in front of car is question of fact for jury, p. 490.

Approved in Peck v. Oregon etc. R. R., 25 Utah, 36, where track in direction from which train came was obstructed by trees and plaintiff slackened speed to slow walk and looked and listened for trains, but did not stop, it was error to refuse instruction that if plaintiff could not see train, and noise of wagon lessened opportunity to hear, it was duty to stop and listen.

Presumption in absence of contrary showing is that specifications con-

tained in statement on motion for new trial conform to those in notice of motion, p. 484.

Approved in *Roberts v. Hall*, 147 Cal. 437, following rule.

134 Cal. 494-499. SIEMSEN v. OAKLAND ETC. RY.

Misconduct of Juror in Visiting, During Trial, scene of accident, and using his examination to show jury how, in his judgment, accident occurred, cannot be proved by affidavit of his admissions to that effect, p. 497.

Approved in *People v. Dobbins*, 138 Cal. 699, affidavit of defendant, which must necessarily rest on hearsay from jurors as to improper statements made by some of them while deliberating on verdict, cannot be received to show misconduct: *People v. Murphy*, 146 Cal. 507, affidavits as to declarations of jurors to defeat verdict where their own affidavits are not permissible for that purpose; *Black v. Rocky Mt. etc. Co.*, 26 Utah, 458, under Revised Statutes of 1898, section 3292, subdivision 2, misconduct of jury other than that specified therein cannot be established on motion for new trial by juror's affidavit.

134 Cal. 531-541. PEOPLE v. AMAYA.

Evidence that After Arrest defendant was brought before deceased, who pointed him out as person who shot him, and that defendant made no reply, is admissible, p. 536.

Approved in *People v. Moran*, 144 Cal. 60, where defendant at first and repeatedly denied being present at time of murder, and finally admitted that he was at scene of murder, his admissions made previous denials of that fact evidence against him; *People v. Philbon*, 138 Cal. 533, declarations of persons not witnesses are admissible for purpose of explaining conduct of defendant and statements made by him in reply thereto.

It is Proper to Instruct that Presumption that witness speaks truth may be repelled by his interest in case, as well as by manner in which he testifies, p. 539.

Approved in *People v. Miles*, 143 Cal. 640, court, in instructing jury as to circumstance or facts surrounding witness may state that jury might scrutinize not only manner of witness while on stand, his relation to case, and other facts, but also his degree of intelligence.

Jury not bound by fact of admission of dying declaration to conclude that it was made in view of impending death, p. 540.

Approved in *People v. Thomson*, 145 Cal. 724, following rule.

Miscellaneous.—*People v. Teshara*, 131 Cal. 543. companion case.

134 Cal. 542-545. PEOPLE v. TESHARA.

Statement of Deceased not Made as dying declaration, but made in

presence of defendant and another brought before him, in which he accused them of shooting him, which defendant denied, is inadmissible, p. 544.

Distinguished in *People v. Cole*, 141 Cal. 90, in prosecution for stealing carpets from furniture company, where it was proved that defendant, while employed by company, delivered carpets to B. at back of store, evidence is admissible to show that when company discovered loss, defendant, when confronted with B., denied delivery to B., and declared he did not know B.

Only Reason for Admitting Accusation of decedent is to explain conduct of deceased as indicating an admission, p. 544.

Approved in *People v. Philborn*, 138 Cal. 532, declarations of persons not witnesses are admissible for purpose of explaining conduct of defendant and statements made by him in reply thereto.

134 Cal. 549-552. HARRISON v. SUTTER ST. RY.

In Action Against Street Railway and Brewery for damages for death of street-car passenger resulting from collision between car and brewery wagon, there is no presumption of negligence against both defendants from facts of injury, p. 551.

Distinguished in *Osgood v. Los Angeles Traction Co.*, 137 Cal. 282, in case of collision of street-car with railway train to injury of passengers, presumption of negligence arises which throws on street railway burden of showing injury was sustained without any negligence on its part.

134 Cal. 557-562. CROLEY v. CALIFORNIA PACIFIC R. R.

When Supervisors of Adjoining Counties agree to pay railroad to build bridge across boundary river, contract is binding on county, p. 562.

Approved in *Contra Costa Water Co. v. Breed*, 139 Cal. 447, *arguendo*.

County Government Act, section, 25, has no application to bridge across a river which is boundary line between two counties, pp. 560, 561.

Approved in *Johnston v. Sacramento Co.*, 137 Cal. 209, supervisors of one county cannot enter into contract with supervisors of another county for joint construction, equipment and maintenance of free public ferry across boundary river.

134 Cal. 573-579. ROWE v. SUCH.

Hypothetical Question Which Assumes Facts not alleged or proved is properly excluded, p. 576.

Approved in *Maynard v. Oregon R. R.*, 43 Or. 74, where passenger in action for damages for injuries testified that collision threw him in corner of car, and that he struck something and fell on floor, and was hurt

in back and had sharp pain there after falling, and experts testified they discovered no evidence of injury to spine, hypothetical question as to whether person might receive, by being thrown, shock that would injure nervous system and spinal cord was unsupported by evidence.

134 Cal. 586-590. MILLER & LUX v. KERN CO. LAND CO.

Action to Recover Damages for injury to real property, p. 587.

Approved in *Miller & Lux v. Kern Co. Land Co.*, 140 Cal. 134, an action to recover damages for injury to a canal may be commenced in county of principal place of business of corporation defendant, and jurisdiction therein is not divested because answer of corporation makes it appear that action will involve question of title to or possession of realty.

In **Action Brought in San Francisco** between corporations having principal business therein to recover damages for injuries to land in Kern county, defendant cannot have cause tried in Kern without showing any grounds to change place of trial as in other cases, pp. 587, 588.

Approved in *Miller & Lux v. Kern Co. Land Co.*, 140 Cal. 134, an action for damages for injuries to canal may be brought in county of principal place of business of corporation defendant, and jurisdiction therein is not divested because answer of corporation makes it appear that action will involve question of title to or possession of realty.

Constitution, Article 13, Section 16, relating to venue of action against corporations applies to actions of tort as well as contract, p. 588.

Approved in *Tingley v. Times Mirror Co.*, 144 Cal. 206, action for libel may be maintained in county where plaintiff resides, against defendant corporation publishing newspaper in another county, which is its principal place of business, when paper in which it was published was circulated in former county.

Miscellaneous.—*Miller & Lux v. Kern Co. Land Co.*, 140 Cal. 139.

134 Cal. 599-602. WEINBERGER v. WIEDEMAN.

New Promise Made After Bar of Statute has fully accrued on original promise does not renew mortgage, lien of which is extinguished by bar, p. 600.

Approved in *Conway v. Supreme Council, C. K. of A.*, 137 Cal. 389, when benefit certificate payable to plaintiff as beneficiary was assigned by member of benefit society as security to indemnify his sureties, who were compelled to pay his debt, and who were designated as beneficiaries in assignment, but were not such under rules of society, and sureties neglected to sue for reimbursement within two years, lien of sureties on certificates was extinguished.

It is for Legislature and not for Courts to determine when bar of statute is legal and proper defense, p. 602.

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Approved in *Conway v. Supreme Council, C. K. of A.*, 137 Cal. 390, where benefit certificate payable to plaintiff as beneficiary was assigned by member of benefit society as security to indemnify his sureties, who were compelled to pay his debt, and who were designated as beneficiaries in assignment, but were not such under rules of society, and sureties neglected to sue for reimbursement within two years, lien sureties on certificates was extinguished.

134 Cal. 603-607. **HAMILTON v. HUBBARD.**

Presumption that Property Acquired During Marriage is community property does not apply where transaction was in effect gift from husband to wife, p. 605.

Approved in *Alferitz v. Arrivillaga*, 143 Cal. 649, burden is on those claiming under mortgage by husband, without wife's signature to show that lands conveyed to wife were community property; *Estate of McCauley*, 138 Cal. 549, Under Civil Code, section 1386, subdivision 9, nieces of deceased husband may inherit from deceased widow the common property inherited by her from deceased husband, notwithstanding there was no brother or sister of deceased husband living at date of widow's death.

134 Cal. 613-616. **WHITE v. WISE.**

Miscellaneous.—*Wise v. Eveland*, 134 Cal. 617, 618, reciting history of litigation.

134 Cal. 618-620. **PEOPLE v. McFARLANE.**

Miscellaneous.—*People v. McFarland*, 138 Cal. 482, reciting history of litigation.

134 Cal. 621-626. **POOL v. SIMMONS.**

Miscellaneous.—*Pool v. Butler*, 141 Cal. 47, reciting history of litigation.